

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF OHIO
3 EASTERN DIVISION

4 - - -
5 JOCELYN TOMPKIN,)
6 Plaintiff,)
7 vs.) CIV. ACTION
8 THE AMERICAN TOBACCO COMPANY,) 5:94-CV-1302
9 et al,)
Defendants.)

10

11

12 DEPOSITION OF MICHAEL M. SHERRY, M. D.

13 THURSDAY, JUNE 28, 2001

14

21

22

23

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2

1 APPEARANCES:

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1 I-N-D-E-X

2 EXAMINATION:

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5 E-X-H-I-B-I-T-S

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1 MICHAEL M. SHERRY, M. D.

2 called as a witness, having been first duly sworn,

3 as hereinafter certified, was examined and

4 testified as follows:

5 EXAMINATION

6 BY MR. SMITH:

7 Q Will you state your name, please, sir?

8 A Michael Sherry.

9 Q And your address, residence and
10 business, please?

11 A [DELETED]

12

13 424 Broad Street, Sewickley Hospital,
14 15143. Suite 424, Sewickley Hospital, Broad
15 Street, Sewickley, PA.

16 Q Is that Sewickley Valley Hospital?

17 A Yep.

18 Q And your home is in [DELETED]?

19 A Yep.

20 Q Would you tell us, please -- well,
21 withdraw that.

22 MR. SMITH: Mary Ellen, would you please

23 mark the notice for depo, if one of the people

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1 there would be kind enough to provide you with
2 one?

3 (Whereupon, the document was marked as
4 Sherry Deposition Exhibit 1 for
5 identification.)

6 BY MR. SMITH:

7 Q Dr. Sherry, would you tell us, please,
8 what you brought with you today?

9 A I have got a black folder of the
10 records.

11 I have three textbooks entitled
12 DeVita --

13 Q What was the last?

14 A DeVita, written by DeVita.

15 Q Your curriculum vitae?

16 A No, no. It's -- do you need the -- do
17 you want the books, their titles?

18 Q Okay. The names of the books. I'll
19 catch up with you.

20 A Cancer --

21 Q We will come back to that in a minute,
22 the names of them.

23 A Okay. I have got three textbooks, a

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1 book I wrote, and then 15 files of records
2 pertaining to the case.

3 Q Dr. Sherry, when you say "files of
4 records," do you mean of the medical records of the
5 plaintiff, of the plaintiff decedent --

6 MR. O'NEILL: No. They are Reliance

7 materials.

8 A Reliance --

9 Q -- David Tompkin's medical records --

10 A Reliance records.

11 Q -- or do you mean medical articles?

12 A Medical articles.

13 Q And I am guessing that you have those in

14 an Expandex folder, numbered --

15 A I have got them --

16 Q -- or are they loose?

17 A -- a couple numbered, and a couple in my

18 hand --

19 Q Okay.

20 A -- and then I have some expert witness's

21 reports.

22 MR. SMITH: Why don't we take time to

23 -- let's mark everything but the books first,

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1 if we could, and I will wait for you to mark

2 them, Mary Ellen.

3 MR. KEMNA: Russ, just for

4 clarification, do you want every individual

5 item separately marked?

6 MR. SMITH: How many of them are there,

7 approximately?

8 MR. KEMNA: There are quite a few, and

9 just to help you out on this, it is a mixture

10 of a couple of articles from the literature,

11 a variety of the expert reports that are

12 actually part of this case, and a mixture of

13 maybe a few other items, but you are going to

14 be talking about -- I don't know -- is it

15 roughly 15 different items --

16 THE WITNESS: Uh-huh.

17 MR. KEMNA: -- separated by particular
18 manila folders within a redwell folder.

19 MR. SMITH: Are they -- they each have a
20 numbering to the packets of the redwell
21 folder?

22 MR. KEMNA: The manila folders I think
23 have some kind of a letter or number

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1 designation on them, don't they?

2 THE WITNESS: Yes. There's 17 of them.

3 MR. KEMNA: Okay.

4 THE WITNESS: We can go over them. No
5 problem.

6 MR. KEMNA: Okay. Do you want to walk
7 through them, Russ, and have them marked, or
8 do you just want them sequentially marked now?

9 MR. SMITH: Why don't -- are they in
10 any way coordinated with, or are any of them
11 coordinated with the eighteen items on the
12 Reliance materials that I have been provided?

13 MR. KEMNA: Certainly a number of them
14 are consistent with the Reliance list. I'm
15 not sure.

16 Are they --

17 MR. O'NEILL: Yes.

18 MR. KEMNA: They are organized, I guess,
19 according to the Reliance materials list, I
20 have been told.

21 MR. SMITH: There's eighteen of them?

22 THE WITNESS: Seventeen.

23 MR. KEMNA: Seventeen numbered items.

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1 MR. SMITH: Which one dropped out? Can
2 you tell?

3 MR. KEMNA: Well, first of all, there
4 are a couple of textbooks which you said you
5 did not want to mark at this point, and I will
6 tell you, at this point they are here for
7 purposes of completeness, but Dr. Sherry does
8 expect to take these books back to his office,
9 and certain of those books are part of the
10 numbered items on the Reliance material list,
11 so there is not a perfect fit here in terms of
12 the numbering of the Reliance material list
13 and the numbering of the file folders.

14 MR. SMITH: Do you have, item one on
15 your Reliance materials are the medical
16 records of David Tompkin?

17 MR. KEMNA: Yes. There is a -- there is
18 a black binder here with medical records in it
19 regarding David Tompkin.

20 MR. SMITH: Does that contain all of the
21 medical records?

22 MR. KEMNA: Well, at this point I will
23 let Dr. Sherry respond.

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1 THE WITNESS: Yes, I think that's fair.

2 MR. SMITH: Pardon?

3 THE WITNESS: Yes, the black thing.

4 MR. KEMNA: I will tell you what, Russ.

5 If you want a little help from me, I can walk
6 through the numbered file folders and describe
7 what is in them sequentially.

8 Do you want to do that?

11 Go ahead. Let's start down that way,
12 anyway.

13 MR. KEMNA: All right. We have a
14 manila folder marked Number 1. It's the
15 original complaint in the case.

16 MR. SMITH: Okay.

17 MR. KEMNA: Number 2 is the Plaintiff's
18 Second Amended Complaint.

19 MR. SMITH: Okay.

20 MR. KEMNA: Number 3 is the Plaintiff's
21 Third Amended Complaint.

22 MR. SMITH: Okay.

23 MR. KEMNA: Number 4 is the deposition

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1 of David Tompkin dated November 8, 1994.

2 MR. SMITH: Okay.

3 MR. KEMNA: Number 5 is the deposition
4 of David Tompkin dated Friday, November 18,
5 1994.

6 MR. SMITH: Okay.

7 MR. KEMNA: Number 6 is the deposition
8 of Jocelyn Ann Tompkin dated June 14, 1995.

9 MR. SMITH: Okay.

10 MR. KEMNA: Number 7 is the letter from
11 Dr. Andrew Hass dated October 14, 1997.

12 MR. SMITH: Okay.

13 MR. KEMNA: Number 8 is the deposition
14 of Andrew J. Hass dated December 19, 1997.

15 MR. SMITH: Okay.

16 (Telephone signaled.)

17 MR. KEMNA: Number 9 is the letter
18 report from Dr. Tomaszefski dated October 20,
19 1997, with the autopsy report attached.

20 MR. McLAUGHLIN: Don, excuse me. Did
21 somebody just join the deposition?

22 MR. SHIVELY: Two people did. That was
23 me, Ben Shively.

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1 MR. SMITH: Now, Ben, you are appearing
2 on behalf of whom?

3 MR. SHIVELY: American Tobacco.

4 MR. SMITH: Did somebody else join?

5 MR. NACE: This is Bryan Nace. I am
6 here, also. I just joined.

9 (No response.)

10 MR. McLAUGHLIN

11 make sure the record reflects who is on the
12 deposition.

IS MR. SMITH FOR SURE.

14 MR. REMINA: Okay. To conclude, Manila
15 folder number 10 is the follow-up report from
16 Dr. Tomashefski dated March 13, 1998.

17 Number 11 is another letter from
18 Tomashefski dated May 18, 2001.

19 Number 12 is a deposition of Dr.

20 Tomashefski dated December 20, 1997.

21 Number 13 is a report of Dr. Feingold
22 dated October 20, 1997.

23 For right now, Number 14 is the report
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1 13
of Dr. David Sidransky dated May 18, 2001.

2 Number 15 for right now doesn't have --

3 MR. SMITH: When you say "for right
4 now," you mean what?

5 MR. KEMNA: Do we have the Halpern
6 paper?

7 THE WITNESS: Yes. It's right here.

8 MR. KEMNA: Yes, this is in 16. Well,
9 I'll tell you what. On Number 15, I don't
10 have anything in it right now.

11 MR. SMITH: Oh, you mean in the pocket?

12 MR. KEMNA: Yes, in the --

13 THE WITNESS: It's this. 15 just has
14 nothing in it.

15 MR. KEMNA: Right. See, the file folder
16 numbered 15 --

17 MR. SMITH: Is empty?

18 MR. KEMNA: It is empty for right now.

19 We might be able to retrace what was actually
20 in it, but we will have all the materials here
21 identified.

22 Number 16 is the paper with lead author
23 Michael Halpern in the Journal of National Cancer

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1 Institute, "Patterns of Absolute Risk of Lung
2 Cancer Mortality in Former Smokers."

3 MR. SMITH: Okay. 17, Lee?

4 MR. KEMNA: Yes. 17 is the Peter Lee
5 paper.

6 MR. SMITH: 18?

7 THE WITNESS: There is no 18.

8 MR. KEMNA: I don't have an 18 here
9 right now, but I think I have identified
10 probably what is Number 15.

11 MR. SMITH: Okay.

12 MR. KEMNA: That would be Dr. Feingold's
13 report dated May 18, 2001.

14 MR. SMITH: Okay.

15 MR. SMITH: Do you have a 19?

16 MR. KEMNA: I don't believe we have a 19.

17 MR. SMITH: Do you have anything after
18 17?

19 MR. KEMNA: No.

20 THE WITNESS: There is a black set of
21 records. You never know what's here.

22 MR. KEMNA: Oh, wait a minute. There is
23 one other item in this redwell, which is Dr.

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15

1 Feingold's report. I believe it is his
2 generic report.

3 MR. SMITH: Where do you have that at?

4 MR. KEMNA: Well, it didn't happen to
5 make its way into one of these folders, or it
6 may have been at one time, but is not now.

7 MR. SMITH: Do you want do put it in 18,
8 then?

9 MR. KEMNA: We don't have a Number 18.

10 MR. SMITH: Oh, your folders end at 17?

11 MR. KEMNA: Right.

12 MR. SMITH: Okay.

13 BY MR. SMITH:

14 Q Okay. Now, do you have with you the
15 report of the Surgeon General on "The Health
16 Benefits of Smoking Cessation," 1990?

17 MR. KEMNA: Would you like Dr. Sherry
18 to respond?

19 MR. SMITH: Yes. Yes, that's fine.

20 BY MR. SMITH:

21 Q Dr. Sherry --

22 A Yes.

23 Q -- do you have with you today "The
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1 Health Benefits of Smoking Cessation" by the
2 Attorney General?

3 A That book?

4 Q I mean of the Surgeon General.

5 A I don't have it on me.

6 Q Okay. Do you have -- the books that
7 you have are titled what?

8 A Cancer, Principles and Practice.

9 Q Is that by Hellman and Rosenberg?

10 A Yep, sixth edition.

11 Q And the other books?

12 A Clinical Oncology by Abeloff, Textbook
13 of Thoracic Oncology by Aisner, Confronting Cancer,
14 by myself, and I guess there is another book on the
15 list I don't have on me.

16 I forgot to bring it. I couldn't carry
17 it.

18 Q I am struggling here on -- the only

19 book -- you have -- do you have a book, Cancer
20 Medicine, fourth edition?

21 A I left it in my office.

22 Q Do you have a book, Thoracic Oncology,
23 second edition, by Roth?

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1 A Yes.

2 Q And do you have a book, Clinical
3 Oncology, second edition, by Abeloff and Armitage?

4 A Yep.

5 Q And do you have another book that you
6 wrote?

7 A Yep.

8 Q The name of your book is?

9 A Confronting Cancer. Do you need the
10 whole -- do you want the whole reference?

11 Q I think, "How to Care for it Today and
12 Tomorrow"?

13 A Yep, 1993. Let me think.

14 '94, Plenum --

15 Q Okay.

16 A -- New York.

17 MR. SMITH: I would like to mark and --
18 I would like to mark some of these books as
19 exhibits, and I would like to work out some
20 way -- he wants to retain physical custody of
21 these books, you are indicating?

22 MR. KEMNA: Well, Russ, these are
23 publicly available textbooks.

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1 MR. SMITH: I understand that they may

2 or may not be, and the problems of getting
3 them, but I would like to get them marked as
4 exhibits and go from there on it.

5 MR. KEMNA: Well, Dr. Sherry is
6 retaining possession of these textbooks.

7 MR. SMITH: Well, whatever. I mean, he
8 is going to do -- I have no physical power to
9 control what he does.

10 First, a couple of reasons: One, I
11 don't know how tough you are, and number two,
12 you are 150 miles from me, but I would ask the
13 court reporter to mark them.

14 Do you have any trouble with that?

15 MR. McLAUGHLIN: Now, Russ, I have a
16 problem with it. It think it's --

17 MR. SMITH: I mean, with having them
18 marked?

19 MR. McLAUGHLIN: Yes, because it is
20 non-traditional to mark textbooks that go a
21 couple of thousand pages and expect that there
22 would be records in the case.

23 MR. SMITH: Well, he can retain physical
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1 custody. I have already said that --

2 MR. McLAUGHLIN: Well, yes.

3 MR. SMITH: -- but I would like to have
4 them marked as exhibits.

5 MR. McLAUGHLIN: Well, what is the
6 purpose of marking?

7 MR. SMITH: I want to have them clear.
8 I just want to have a clear record, so when we
9 are talking about them.

10 I don't care if she puts -- as long as
11 he can keep it together with them during the
12 course of this case, which is only going to be
13 a couple more months, if you just put a piece
14 of paper in there with the exhibit number, for
15 all I care.

16 MR. McLAUGHLIN: All right. But you are
17 not asking that the doctor give up possession
18 and control of his textbooks?

19 MR. SMITH: Not at this second.

20 MR. McLAUGHLIN: Well, at any time?

21 MR. SMITH: Well, I don't -- how do I
22 know? If Judge Dowd would order it, I guess.
23 I just wanted to have them identified

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20

1 clearly right now --

2 MR. McLAUGHLIN: Well --

3 MR. SMITH: -- as part of the depo.

4 MR. McLAUGHLIN: Well, let me just say,
5 I am objecting to what you are doing, if you
6 are going to expect the doctor to hand carry a
7 bunch of textbooks into the courtroom, but we
8 will address that with Judge Dowd.

9 If you want to have them marked for
10 purposes of this deposition, that is fine,
11 but --

12 MR. SMITH: That's what I want to do.

13 MR. McLAUGHLIN: -- we ought to agree
14 that these textbooks are staying with the
15 doctor, and they are not going to be carried
16 --

17 MR. SMITH: I don't have any problem
18 with your taking physical custody of them --

19 MR. McLAUGHLIN: All right.

20 MR. SMITH: -- but I am not stipulating
21 beyond that, though.

22 MR. McLAUGHLIN: Well, neither are we.

23 MR. SMITH: I am not asking you to.

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1 MR. McLAUGHLIN: Okay. Russ, you are --

2 MR. SMITH: We will get them marked and
3 move on.

4 MR. KEMNA: Here is what we are going to
5 do.

6 We will hand the court reporter a pad
7 that she can put the Deposition Exhibit marker
8 on, and we will insert it into the book, and
9 we can use it for purposes of identification
10 during the course of the deposition.

11 MR. SMITH: That's fine, and I am going
12 to ask him to keep it with the book when he
13 leaves.

14 MR. McLAUGHLIN: Okay.

15 MR. SMITH: I think there's -- it sounds
16 like there are four of them there.

17 MR. KEMNA: Yes.

18 (Discussion off the record.)

19 (Whereupon, the books were marked as
20 Sherry Deposition Exhibits 2, 3, 4 and 5 for
21 identification.)

22 MR. SMITH: Is Cancer, Principles and
23 Oncology, is that one?

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1 THE WITNESS: That's --

2 THE REPORTER: That would be 2.

3 THE WITNESS: The sixth edition.

4 MR. SMITH: All right. The sixth, sixth
5 edition. *Cancer, Principles and Practice of*
6 Oncology is Exhibit 2?

7 MR. McLAUGHLIN: No. Look, why don't
8 you just have us tell you what they are?

9 MR. SMITH: Great. Go for it.

10 MR. McLAUGHLIN: Exhibit 2, Russ, is the
11 *Confronting Cancer*, the book by Dr. Sherry.

12 MR. SMITH: All right.

13 MR. McLAUGHLIN: Exhibit 3 is *Cancer,*
14 *Principles and Practice of Oncology*, sixth
15 edition.

16 MR. SMITH: Yes, sir.

17 MR. McLAUGHLIN: Number 4 is
18 *Comprehensive Textbook of Thoracic Oncology*.

19 MR. SMITH: Is that in that Reliance
20 list Number 17? It just says "Thoracic
21 Oncology" on it, the book.

22 MR. McLAUGHLIN: Well, it looks to me
23 like the authors are different.

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1 This is edited by Aisner and others.

2 MR. SMITH: Then maybe I ought to -- if
3 you can define that very clearly, like you
4 would on the Reliance list for me --

5 MR. McLAUGHLIN: Okay.

6 MR. SMITH: -- because it is a different
7 book than is here.

20 THE WITNESS: Yes.

21 MR. SMITH: Is that right?

22 THE WITNESS: Yes, that's right.

23 MR. McLAUGHLIN: Okay. Yes. Dr. Sherry

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1 says it's right.

2 THE WITNESS: Yes.
3 picked up the wrong book.

4 MR. SMITH: Okay.

5 THE WITNESS

7 MR. SMITH: All right. Then the other

9 MR. KEMNA: Exhibit Number 5 is titled
10

11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40

MR. KEMPTON: The author is available.

13 MR. SMITH: And which one is 4? Is
14 that --

15 THE WITNESS: 4 was the mistake.

16 MR. KEMNA: 4 was the mistake.

17 MR. SMITH: Then why don't we delete
18 that? We will just, say, use that 4 on
19 another one, then. I think it will work for
20 us.

21 Or leave 4 on it. That's okay. I guess
22 that is clear. I'm sorry.

23 And then Number 6 would be Cancer

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1 Medicine?

2 THE WITNESS: I didn't bring it.

3 BY MR. SMITH:

4 Q Okay. So there's three books on your
5 reference or Reliance materials that you do not
6 have, and one of them is the report of the Surgeon
7 General, 1990? Is that correct?

8 A Yes.

9 Q And another one is Cancer Medicine,
10 fourth edition? Is that correct?

11 A Yep.

12 Q And the last one is Thoracic Oncology,
13 second edition?

14 A Yes.

15 MR. SMITH: Okay. Okay. We will go
16 ahead on this.

17 I would like to get the Hellman and Lee
18 articles marked.

19 MR. KEMNA: All right. Lee, which
20 was in Folder Number 17?

21 MR. SMITH: Yes, sir.

22 MR. KEMNA: I will set it in front of

23 the court reporter.

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1 MR. SMITH: That would be Number 6,

2 then?

3 MR. KEMNA: Yes, that would be Number 6.

4 MR. SMITH: And Halpern will be 7?

5 MR. KEMNA: Yes, if I can locate it
6 here.

7 Okay. The Halpern article is in Folder
8 Number 16, and I will put that here for the
9 court reporter to mark as well.

10 Also, Russ, while we are dealing with
11 all the materials brought to the deposition,
12 we have two x-rays, actually, I should say two
13 folders of x-rays.

14 The first one is exam date June 9,
15 1992. It is a CT of the chest, with
16 enhancement.

17 MR. SMITH: Okay.

18 MR. KEMNA: It lists six films on the
19 cover for the folder, and there are six films
20 in that folder.

21 The second folder --

22 MR. SMITH: And those are from what
23 medical facility?

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1 MR. KEMNA: This is from Cuyahoga Falls
2 General Hospital Radiology Department --

3 MR. SMITH: Okay.

4 MR. KEMNA: -- and it has an obtained
5 date of October 27, 1994, so that's the date
6 we actually obtained the x-rays, as opposed to

7 the exam date that I gave you.

8 MR. SMITH: Okay, sir.

9 MR. KEMNA: The second folder has an
10 obtained date of October 27, 1994.

11 The exam date is June 9, 1992.

12 That's the chest PA and lateral view, so
13 there's two films --

14 MR. SMITH: Okay.

15 MR. KEMNA: -- in the folder, and it is
16 also from Cuyahoga Falls General Hospital.

17 MR. SMITH: Okay. We ought to mark
18 those, then, 8 and 9, please.

19 MR. McLAUGHLIN: Let the court reporter
20 catch up with the marking, Russ, so everybody
21 just sort of needs to give the court reporter
22 about two minutes, right?

23 Okay.

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1 (Discussion off the record.)

2 (Whereupon, the documents were marked as
3 Sherry Deposition Exhibits 6, 7, 8 and 9 for
4 identification.)

5 MR. McLAUGHLIN: Okay. Now, Russ, the
6 court reporter has marked Exhibits 6, 7, 8
7 and 9.

8 MR. KEMNA: Did you get that, Russ?

9 MR. SMITH: 6, 7, 8 and 9 I have. I am
10 guessing Lee is 6, Halpern is 7, PT, 8, and PA
11 and lateral are 9 --

12 MR. McLAUGHLIN: That's --

13 MR. SMITH: -- correct, or am I missing

14 it?

15 MR. O'NEILL: The CT is 9. The PA and
16 lateral is 8.

17 MR. SMITH: Okay. The PA and lateral
18 are 8, and the CT is 9?

19 MR. O'NEILL: That's right.

20 MR. SMITH: Thank you. Lee is 6?

21 MR. McLAUGHLIN: Yes, Lee is 6, and --

22 MR. SMITH: Halpern is 7?

23 MR. McLAUGHLIN: Halpern is 7, right.

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1 MR. KEMNA: Yes.

2 MR. SMITH: Thank you. Okay. Mary
3 Ellen, are we ready to go?

4 (Discussion off the record.)]

5 MR. SMITH: And I guess, as in the other
6 depositions, the fact that this is being taken
7 by telephone just sort of heightens it
8 somewhat.

9 My understanding is that no one will
10 have any communication with the witness,
11 either orally or in any non-verbal fashion,
12 and we will go forward on that premise.

13 Does that sound okay?

14 MR. McLAUGHLIN: All communications --

15 MR. KEMNA: That's fine.

16 MR. McLAUGHLIN: All communications will
17 be on the record.

18 MR. SMITH: I can't hear you. I'm
19 sorry.

20 MR. McLAUGHLIN: All communications will
21 be on the record.

22 MR. SMITH: Yes, except I don't think
23 there is any need for communication with

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1 the witness.

2 MR. McLAUGHLIN: No, Russ. I just said
3 that all communication will be on the record,
4 so if we have to communicate with the witness
5 or with you during the course of the
6 deposition, we will do it on the record.

7 MR. SMITH: Well, I don't know that --
8 I don't know that -- if you are going to
9 communicate with the witness, I would like the
10 record to reflect that is who you are
11 communicating with.

12 MR. McLAUGHLIN: That is what I just
13 said. We will do it on the record.

14 We will do it verbally on the record so
15 that you can hear it, and it can be recorded.

16 MR. SMITH: Fair enough.

17 BY MR. SMITH:

18 Q Dr. Sherry, do you have your report with
19 you?

20 A Yes.

21 MR. SMITH: We had better mark that,
22 also.

23 - - -

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1 (Whereupon, the document was marked as
2 Sherry Deposition Exhibit 10 for
3 identification.)

4 BY MR. SMITH:

5 Q Dr. Sherry, are there any other papers
6 that you brought with you?

7 And the reason I am particularly
8 concerned about it, I had mentioned everything that
9 you brought, and I am sure you misunderstood that
10 that didn't include the report, but is there
11 anything else that you brought that we may --

12 A I have --

13 Q Pardon?

14 A I have the expert record of Edwin
15 Bradley --

16 Q Okay. Let's --

17 A -- dated May 14, 2001.

18 Q Anything else?

19 A I have got a notice for the deposition.

20 Q Anything else, sir?

21 A I think that's it, right?

22 Q I don't care if it's scratch notes or
23 whatever, but any other -- anything else?

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1 A A piece of paper with about three little
2 lines I can't read.

3 Q Okay. Anything else?

4 A I believe that's it, isn't it?

5 MR. SMITH: Let's mark 11 and 12 and 13,
6 then, please.

7 MR. McLAUGHLIN: What do you want
8 marked, Russ?

9 MR. SMITH: I guess I have the
10 impression the report -- the report is --
11 well, no. I withdraw that. The report will
12 be 10.

13 MR. McLAUGHLIN: The report is 10.

14 MR. SMITH: Bradley would be 11.

15 THE WITNESS: Here you go.

16 MR. McLAUGHLIN: Okay.

17 MR. SMITH: 12 would be the notice.

18 MR. McLAUGHLIN: Well, the amended
19 notice is Sherry Depo 1.

20 MR. SMITH: Oh, I thought he was
21 referring to something different.

22 MR. McLAUGHLIN: No.

23 MR. SMITH: That's just why I was trying

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1 to be complete.

2 MR. McLAUGHLIN: No. Actually, I think
3 it was the earlier one.

4 MR. SMITH: It has already been marked?

5 MR. McLAUGHLIN: No. Notice to take
6 telephonic deposition --

7 MR. SMITH: Okay.

8 MR. McLAUGHLIN: -- so that would be
9 what? 12?

10 MR. SMITH: I don't know. I guess I
11 just was running down the list.

12 MR. McLAUGHLIN: Okay.

13 MR. SMITH: And then whatever these
14 notes are would be 13.

15 MR. McLAUGHLIN: Okay.

16 BY MR. SMITH:

17 Q Does that cover everything, Dr. Sherry?

18 A Yes, sir.

19 MR. KEMNA: Russ, let me just clarify,

20 just for completeness sake, I opened the cover
21 of this black binder with the medical
22 records --

23 MR. SMITH: Yes, sir.

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1 MR. KEMNA: -- and there were four
2 stapled items in there, that if you like, I
3 can just itemize them for you?

4 MR. SMITH: Okay.

5 MR. KEMNA: Okay. The first one is the
6 deposition of Andrew Hass of December 19,
7 1997.

8 The next item is a letter from Dr.
9 Tomashefski dated March 13, 1998.

10 The next item is a letter from Dr.
11 Tomashefski dated October 20, 1997.

12 The next item is a letter from Dr. Allan
13 Feingold dated October 20, 1997, and those are
14 the four items that were loose within the
15 black binder.

16 MR. SMITH: Say, you know, this reminds
17 me of one thing that I was thinking of for
18 tomorrow.

19 I see here we have on Dr. Hass, we have
20 had faxed -- we have had FEDEXed to us, that
21 came in while I was in Florida, these depos,
22 two boxes of material.

23 If you could ask whoever is in your

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1 office to somehow get those premarked, so
2 hopefully they will coordinate with what we
3 have here, because I don't want to take up the

4 whole four hours, you know, marking stuff that
5 we are getting in the mail.

6 That would be my request to you guys.

7 Okay?

8 That could help us a lot. I don't want
9 to -- the stuff, I just got it in the mail,
10 and there's no way for me -- I don't want to
11 take up the whole depo marking them, but
12 that's a request that maybe somebody -- that
13 one of you guys can get ahold of me.

14 MR. McLAUGHLIN: You know what? I think
15 Craig Proctor is going to be out --

16 MR. SMITH: Yes.

17 MR. McLAUGHLIN: -- in Montana.

18 MR. SMITH: I think so, too, and that is
19 why I was asking if somebody from Shook, Hardy
20 could get word back to Craig that that is our
21 request.

22 MR. McLAUGHLIN: We are trying to pass
23 that on to him, but with travel and timing --

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1 MR. SMITH: Either you will or you
2 won't, but I just don't want it charged to my
3 four hours.

4 That's all I'm asking.

5 MR. McLAUGHLIN: Yes.

6 MR. SMITH: I just got them. I mean, we
7 just received the stuff.

8 MR. McLAUGHLIN: Right.

9 MR. SMITH: I don't mind it for small
10 amounts, but I don't want to use four hours to

11 do it.

12 MR. McLAUGHLIN: No, no, well,
13 especially since you are going to be up all
14 night reading this stuff.

15 No. We will try to convey that.

16 We will try to catch up with Craig and
17 convey that, Russ.

18 BY MR. SMITH:

19 Q Dr. Sherry, does your report, which has
20 been marked --

21 MR. McLAUGHLIN: Well, none of it has
22 been marked yet, because the court reporter
23 hasn't had a chance to mark it.

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1 MR. SMITH: Oh, I thought she was ready.

2 I'm sorry.

3 MR. McLAUGHLIN: No. It's sitting at
4 11. Well, but we have got --

5 MR. SMITH: I will let her mark them,
6 and then we can get started. That's okay.

7 MR. McLAUGHLIN: We have got several
8 exhibits that you want marked that haven't
9 been marked yet, so starting with the Bradley
10 report.

11 MR. KEMNA: Let her do it, because as
12 long as we are talking, she can't mark.

13 MR. SMITH: All right.

14 (Discussion off the record.)

15 (Whereupon, the documents were marked as
16 Sherry Deposition Exhibits 11, 12 and 13 for
17 identification.)

18 BY MR. SMITH:

19 Q Dr. Sherry, is Plaintiff's Exhibit

20 Sherry 10, is that your report in this case?

21 A Yes, sir.

22 Q Is that identical to the one we were
23 previously provided?

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1 A I believe so, yes, sir.

2 Q Does that contain all of the opinions
3 that you intend to express in this case, if asked?

4 A Yes, sir.

5 Q Does it contain all the bases, the
6 reasons and the facts and information upon which
7 those opinions are based and which support them?

8 MR. KEMNA: Well, let me just state an
9 objection.

10 Russ, this is an expert report filed in
11 compliance with Rule 26 and --

12 MR. SMITH: I am going to object to the
13 speaking objection, but go ahead.

14 MR. KEMNA: Well, it is a report. It is
15 filed in compliance with Rule 26.

16 It is what it is represented to be for
17 this case in Federal Court, and Dr. Sherry has
18 indicated the essence of his opinions in that
19 report.

20 MR. SMITH: I am going to -- I am going
21 to object to speaking objections or anything
22 that's suggestive.

23 MR. KEMNA: I have stated my objection.

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1 MR. SMITH: I would ask the court

2 reporter to read the question back to Dr.

3 Sherry.

4 (Discussion off the record.)

5 (Record read.)

6 MR. McLAUGHLIN: Note my objection for

7 the record as well, because Russ, as you know

8 --

9 MR. SMITH: I don't want -- I am
10 objecting to speaking objections.

11 I don't know. That's my -- Dr. Sherry
12 is the only one that knows.

13 MR. McLAUGHLIN: Well, you can object,
14 but just as we objected to your speaking
15 objections at the depositions I have attended,
16 it didn't deter from you making them.

17 MR. SMITH: I made my -- I tried to
18 limit my speaking objections to where I
19 thought there was a misquote of a prior
20 question or answer, frankly.

21 MR. McLAUGHLIN: Well, that's not my
22 recollection, but I am going to say what I
23 have to say, and then I will sit down, but the

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1 expert witness is supposed to prepare a report
2 which summarizes opinions, and you are
3 entitled to a discovery deposition to explore
4 the bases for the opinions.

5 MR. SMITH: Well, that's your -- you
6 know, that's your judicial opinion, but --

7 MR. McLAUGHLIN: Thank you, sir.

8 MR. SMITH: -- my question is on the
9 floor to the witness.

10 MR. McLAUGHLIN: All right. Doctor, you

11 can --

12 BY MR. SMITH:

13 Q Dr. Sherry, that is my question, if you
14 can answer it.

15 A Well, read it again.

16 MR. SMITH: Who said, "Read it again"?

17 MR. McLAUGHLIN: The witness.

18 THE WITNESS: Yes. I did.

19 (Discussion off the record.)

20 (Record read.)

21 A Well, it contains my -- my opinion
22 concerning the case.

23 I don't know.

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1 Q Does it contain what supports those
2 opinions, what you are basing them on?

3 A Well, that, plus my experience in
4 practice and life.

5 Q Pardon? I can't hear you.

6 A Yes, and it -- but I would also say my
7 opinions are based on my life's experience as well.

8 Q And by "life experience," you mean what?

9 A Professional life experience.

10 Q What does that mean?

11 A Practicing medicine for eighteen years,
12 or fifteen years.

13 Q That's your experience as a physician?

14 A Yes, sir.

15 Q And is it based on any -- is it based
16 on anything else?

17 A Research I did when I wrote the book,
18 periodic reading that you do, keeping up, you know,
19 other professional things like that, the routine
20 you know, routine professional readings and
21 experiences, you know, in a clinical practitioner.

22 Q Well, I want to know, as we go through
23 here, the specifics of it to the best of your

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1 ability to give them to us, please, and for
2 instance, on Item 2 -- I guess on Item 1, you have
3 no criticism of the medical care that David Tompkin
4 received is my understanding?

5 A That's correct.

6 Q Do you have any criticism of anything
7 that was done in conjunction with his diagnosis,
8 treatment, reading of x-rays, anything else, any
9 criticisms whatsoever?

10 A I thought it was within reasonable
11 medical care.

12 Q So you have no criticisms, as you sit
13 here right now?

14 MR. McLAUGHLIN: Objection.

15 MR. KEMNA: Objection.

16 BY MR. SMITH:

17 Q Is that true or false? If there are
18 any, I would just -- I would like to ask you what
19 they are.

20 MR. KEMNA: Objection.

21 A I thought the medical care was
22 appropriate.

23 Q So you are rendering no criticisms as of
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1 this time? Is that true?

2 A Well --

3 Q That's my question. If there are, if
4 you have some, just say yes, and please tell me
5 what they are.

6 A My only -- I have no criticisms at the
7 present time.

8 I thought he was treated in a reasonable
9 fashion to a reasonable standard of community
10 medical care.

11 Q Doctor Sherry, in Item Number 2, you
12 indicate that it was your opinion that to a
13 reasonable degree of medical certainty, due to
14 significant risk reduction, his lung cancer is most
15 likely not related to his smoking history, and you
16 say that is supported by your clinical experience.

17 Tell me what about your clinical
18 experience supports that, please.

19 MR. SMITH: Objection. I think you
20 mischaracterized his prior answer.

21 MR. SMITH: I am looking --

22 A Okay.

23 MR. SMITH: -- at Item Number 2 in his
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1 report.

2 MR. McLAUGHLIN: His report, Page 3?

3 THE WITNESS: Yes.

4 MR. SMITH: Yes, sir.

5 MR. McLAUGHLIN: All right.

6 BY MR. SMITH:

7 Q Will you tell me --

8 A Well, I --

9 Q -- specifically what of your clinical
10 experience supports that?

11 A Well, there are people that have other
12 -- I mean, in terms of causality, this gentleman
13 had other, you know, risk factors for lung cancer,
14 and I have seen people with adenocarcinomas who
15 never smoked, and it was not beyond -- you know,
16 it's rare, but it happens.

17 Q What is?

18 A That --

19 Q Pardon?

20 A -- people have other risk factors for
21 lung cancer, and rarely people who never smoked get
22 adenocarcinoma, so in my experience, people without
23 any smoking exposure get lung cancer, and the

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1 medical literature says that the -- you know, the
2 risk approaches that of a non-smoker.

3 I mean, that's the two things. I think
4 that is what you are driving at, sir.

5 Q Let me ask you this: Going back to --
6 your clinical experience, Dr. Sherry, has been what
7 with respect to lung cancer?

8 How many lung cancers have you treated?

9 A Probably 400 --

10 Q And would those have been --

11 A -- over 15 years, anywhere between 25
12 and 50 a year.

13 Q And that would -- when you say 15
14 years --

15 A '86 to 2001 --

16 Q Okay.

17 A -- and then actually, '80 to '86, the
18 residency and internship.

19 Q And would that be your -- is your best
20 estimate, then, that the total ones you treated
21 would be how many?

22 A Oh, somewhere in the three to four
23 hundred range.

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1 Q Okay. Of those, have you ever made a
2 record, trying to determine how many of them
3 involved smokers, and how many did not, or is this
4 something you are trying to take your memory back
5 to --

6 A Well, most of them occur in smokers.

7 Q And when you say "most of them" --

8 A I would say 90 percent.

9 Q And your best estimate would be, about
10 10 percent of the people you have treated for lung
11 cancer were not smokers?

12 A Probably five to seven would be closer
13 to my experience. Probably five.

14 Q Okay.

15 A And then five to seven percent, maybe 90
16 to 93.

17 Q Okay. Let me catch up. I am reading
18 that as -- and I want you to correct me if I am
19 wrong. I am reading, 93 to 95 percent of the
20 people you have treated for lung cancer were
21 smokers, and five to seven --

22 A Five to seven.

23 Q -- were non-smokers, as best you can

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1 recall?

2 A Yes, sir.

3 Q Is that a fair assessment of what you

4 just said?

5 A Yes, sir.

6 Q And you base that on recollection, or

7 recollection combined with something you have read

8 on the subject?

9 MR. KEMNA: Objection.

10 A Probably both.

11 Q Can you tell me --

12 A Yes, both.

13 Q Okay. And you have read -- you

14 referred to relevant medical literature at the end

15 of Item 2 on page three of your opinions.

16 A Uh-huh.

17 Q Can you tell me what the relevant
18 medical literature is that you have read, you know,
19 that supports this opinion?

20 A Well, when I wrote my book, I went back,
21 and I made the observation that the risk approaches
22 the non-smoker at 15 years.

23 I remember -- and I apologize; I can't

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1 pull it out -- I did research for that chapter on
2 lung cancer, and I remember finding that pretty
3 generally in the -- in the texts of medicine.

4 Q And that is something --

5 A -- so --

6 Q I'm sorry.

7 A -- that was when I was writing my book.

8 I'm sorry I can't remember the exact reference.

9 Q Dr. Sherry, in your book, did you make
10 that statement?

11 A I think it's close to that statement,
12 yes, sir, that the risk approaches the non-smoker
13 after 15 years. That was in '93.

14 I have subsequently read other articles,
15 a couple that Bernie O'Neill provided, gave me --

16 Q Did you --

17 A -- but I wrote in the book that the risk
18 of lung cancer approaches the non-smoker after 15
19 years, and I cannot give you the exact reference
20 that I got that, but I remember, when I was writing
21 my book, I would resort to the internet and texts
22 of medicine.

23 MR. McLAUGHLIN: Doctor, let me hand you

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1 your book.

2 A I am looking through my book, sir. Can
3 I look at the chapter?

4 Sir, what do you want me to do?

5 Q You have your book with you, you say?

6 A Yes. I have got my -- yes. It's
7 Exhibit 2.

8 Q I'll tell you what. I would like --
9 maybe we can come back to it, if we have time.
10 Okay?

11 I don't want to take the time.

12 A Well, no, but you were asking -- I think
13 -- I just want to make sure I wrote that in the

14 chapter.

15 Q Oh, go ahead, if you can find it, you
16 know, quickly.

17 A I have got a chapter on lung cancer.

18 Q Yes, sir.

19 A Hold on.

20 Q Oh, no, no, no. If you can do that
21 quickly, go ahead.

22 A "A smoker's risk of lung cancer
23 decreases steadily for 15 years following

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1 cessation, at which point the risk of the former
2 smoker begins to approach that of a person who has
3 never smoked."

4 MR. McLAUGHLIN: What page, Doctor?

5 THE WITNESS: Page 27.

6 BY MR. SMITH:

7 Q So you had stated that it begins to
8 approach that of a person who had never smoked?

9 A Correct.

10 Q And can you -- that chapter --

11 A That's what --

12 Q -- you wrote on --

13 A So I mean, what I am saying is, I am not
14 trying to duck the question.

15 I am saying, I do remember looking stuff
16 up, and I can't give you the reference right now,
17 but it is with respect to my research --

18 Q The --

19 A -- and the book was published in '93,
20 which is way before the proceedings.

21 MR. McLAUGHLIN: Wait for the next

22 question, please.

23 THE WITNESS: Okay.

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1 BY MR. SMITH:

2 Q There is a question here. Could you
3 hear me trying to ask two questions just in the
4 last couple of minutes?

5 A Go ahead.

6 Q I don't know how well the --

7 MR. SMITH: Mary Ellen, are you having
8 trouble hearing me?

9 (Discussion off the record.)

10 MR. KEMNA: Russ, I think what your
11 problem may be, and it depends on the design
12 of the speaker phone, but there may be an
13 override if someone is talking on this end
14 while you are talking --

15 MR. SMITH: Yes, sir. That's -- I think
16 that's true, and I don't know whether --

17 MR. KEMNA: I think the solution for
18 this, if you don't mind, I will suggest to Dr.
19 Sherry that he just wait for the question to
20 be asked and then make sure that the question
21 was completed before he begins his response,
22 and hopefully we will avoid cutting off your
23 question.

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1 MR. SMITH: Yes. We will do our -- you
2 know, we will all do our best on it.

3 BY MR. SMITH:

4 Q Dr. Sherry, the -- I think -- I want

5 to make sure I don't have a -- can you hold up
6 about twelve seconds?

7 MR. KEMNA: Sure.

8 (Discussion off the record.)

9 BY MR. SMITH:

10 Q The book that you are referring to, does
11 it have a footnote of any kind to that cite, or is
12 that just -- that's a book that you wrote for your
13 patients?

14 A That's -- it's not annotated. It is not
15 scientifically footnoted.

16 Q Okay. I follow you. And that was
17 written for the benefit of your patients?

18 A Correct.

19 Q And was the sentence in there regarding,
20 you begin approaching the condition of a non-smoker
21 risk, was that part of that to encourage your
22 patients to quit smoking --

23 A I would -- yes.

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1 Q -- teaching them? You were writing to
2 them that there is a benefit in quitting smoking?

3 A Correct.

4 Q Okay. You mentioned that Bernie Owens
5 [sic.], one of the attorneys for Shook, Hardy, gave
6 you a couple of books to read?

7 A No. An article on risk reduction.

8 Q Do you have that?

9 A It's the Halpern article.

10 Q That's the Halpern. That's where you
11 received it.

12 And the other article was Lee?

13 A Yes. They -- those are two additional
14 articles.

15 Q Okay. When you indicate that in your
16 own clinical experience, approximately -- I don't
17 want to misquote this -- approximately 93 to 95
18 percent of people you had treated, you based that
19 upon your clinical experience and what you have
20 read, do you have any recollection about the people
21 you treated who had lung cancer who hadn't smoked?

22 MR. KEMNA: Objection to form.

23 A I would like to say that in the book, on

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1 Page 24, I say that it is 85 percent of lung cancer
2 cases --

3 Q Okay.

4 A -- but I mean, there is an inconsistency
5 with the 93 and the 85, but I have a suspicion -- I
6 don't know -- that I got that from a text.

7 Q Which one? Which?

8 A The 85 percent number.

9 Q Okay. You have revised it?

10 A In my heart, it would be closer to 90,
11 but I wanted to point that out.

12 Q That's fair enough.

13 A So it is 85 that I wrote, but that's a
14 ball park, and then you asked me about non-smokers
15 with lung cancer?

16 A Yes, sir. Do you have a recollection of
17 anything about their characteristics at all,
18 anything about them at all that --

19 A Well, the thing I remember most is that

20 they are not happy, because they never smoked.

21 The patients are upset, and they -- the
22 ones I can remember off the top of my head, I can
23 remember a couple of adenocarcinomas in people that

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1 did not smoke.

2 Q Do you recall whether or not they were
3 around others who did smoke one way or the other?

4 Do you have any recollection of that?

5 A I think a fair proportion would say that
6 they have been around smoking in some fashion. I
7 can't recall exactly.

8 Q Would you have a view as to whether or
9 not environmental smoke or smoke that people are
10 around can cause lung cancer?

11 MR. KEMNA: Objection.

12 A I think there's literature saying that
13 second-hand smoke slightly increases.

14 Q The risk of lung cancer?

15 A The risk of lung cancer.

16 Q Is that your belief as well?

17 A I would -- I think that there are
18 harmful effects of second-hand smoke.

19 Q Do you think they would include lung
20 cancer?

21 A Yes.

22 Q Is there anything else, Dr. Sherry, that
23 you can think of that we haven't talked about that

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1 supports your opinion in Paragraph 2?

2 A Well, are we going to talk about
3 paragraph three next --

4 Q Yes.

5 A -- or I don't know how we want to do
6 this.

7 Q Yes. That's what I was thinking of
8 doing. Does that sound all right to you?

9 A Yes, sir.

10 Q But anything else about two that we have
11 left out that you can think of?

12 MR. KEMNA: Objection.

13 A I think the paragraph states my opinion
14 well.

15 Q Okay. And we have covered what you are
16 basing it upon, to the best of your recollection?

17 MR. KEMNA: Objection.

18 A Well, I mean, you can ask me more when I
19 -- I mean, I --

20 Q I can't really --

21 A Implied is that I am basing it on my
22 life's experience.

23 Q Yes. I am with you.

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1 A Okay.

2 Q Is there anything about your life's
3 experience that you can think of, as we are talking
4 here, that supports that that we haven't covered?

5 MR. KEMNA: Objection.

6 A Not that I recall at present.

7 Q Okay. In paragraph three, does
8 paragraph three state the bases and the reasons and
9 the facts and information upon which you base the
10 opinion as set forth in paragraph three, sir?

11 MR. KEMNA: Objection.

12 A Specifically, it can't be determined,
13 because there's many factors.

16 Q I think there's really two opinions in
17 there, in fairness to you.

18 Does that sound right to you?

19 A Well, which ones?

20 Q In paragraph three, it looks to me like
21 there was an opinion in the first sentence and an
22 opinion in the last sentence, but I don't know
23 that.

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1 I am asking you, or at least that's what
2 I thought you were trying to communicate, and if I
3 missed --

4 A Well, there are other explanations why
5 this gentleman had lung cancer.

6 Q Yes, sir.

7 A His exposure to asbestos is one.

8 Q Okay.

10 Q Let's talk about that first, then. Is
11 that a good place to start out?

12 A Which one do you want to talk about?

13 The asbestos?

14 Q No. We will start out with both of
15 them, but that first sentence.

16 A Okay.

17 Q Sure. Let's talk about the asbestos and
18 your thoughts on that, please.

19 A The gentleman had a documented exposure
20 to asbestos that was confirmed pathologically, and
21 as such, that is a risk factor for cause for
22 subsequent development of lung cancer.

23 Q And the reason you make that statement

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1 is why?

2 A Well, I think there's a bunch of risk
3 factors this gentleman has.

4 Q No. But I was talking about the
5 asbestos first.

6 The reason it is your view that -- is it
7 your view that asbestos can cause lung cancer,
8 asbestos exposure?

9 A Yes.

10 Q Okay. And can you tell us what you base
11 that on?

12 A The medical literature.

13 Q And anything --

14 A I think it's an accepted risk factor for
15 lung cancer.

16 Q And based upon the medical literature?

17 A I believe, sir, yes.

18 Q Let me ask this question. You listed
19 the Surgeon General's report.

20 Was that something that you have been
21 provided with in conjunction with this case?

22 A Well, I read it over the years.

23 Q You had it? You had it yourself?

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1 A I had it in the early '90s as a source

2 material.

3 Q And that would have been for what
4 purpose?

5 A Writing my book.

6 Q And your book was written when?

7 A '93. I wrote it from '89 to '92. It
8 went to -- I started writing it in '89.

9 I finished it in '93, and it went to
10 press in '94.

11 Q Okay.

12 A I have -- I used to get a lot of
13 material from the government. There's internet
14 sources, cheap. There's data bases.

15 Before the internet was so well known, I
16 used to get stuff from the government data bases,
17 so I remember seeing that Surgeon General's report.

18 I think the one that Mr. O'Neill brought
19 in was later than the one that I remember before.

20 Q Let's back up maybe a minute and talking
21 about getting into the book and the research.

22 You were born in Pittsburgh, is my
23 understanding?

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1 A Yes, sir.

2 Q And did you go to high school in
3 Pittsburgh?

4 A Central Catholic, the class of '70.
5 Danny Marino went to my high school.

6 Q He did?

7 A Yes.

8 Q That's pretty impressive. How come he
9 didn't play for the Steelers? You guys didn't put

10 in enough -- you didn't pay him enough money, or
11 something?

12 A I'm telling you. You know what?

13 Mistakes are how you learn.

14 Q And the Pirates?

15 MR. McLAUGHLIN: Well, Namath got away,
16 too, and he is just right up the road in
17 Beaver Falls.

18 BY MR. SMITH:

19 Q You don't remember Rosie Rosenblum?

20 A No, sir.

21 Q He used to do Pirates games.

22 A Oh, Rosewell, Rosie Rosewell?

23 Q Rosie Rosewell.

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1 A "Look out, Minnie, here it comes. Open
2 the door, Aunt Minnie."

3 Q "Open the door, open the window."

4 A "Open the window, Aunt Minnie. Here
5 comes one," sir.

6 Q Yes.

7 A There you go.

8 Q I had an uncle that used to take me out
9 to the ball game on the streetcar.

10 Then you went to college at -- you
11 started out --

12 A George Washington University, from '70
13 to December of '71.

14 Q And what were you gearing in on being at
15 that time?

16 A A school teacher.

17 Q And you wanted to teach -- was it
18 history you wanted to teach?

19 A Yes, sir.

20 Q What were your activities in high
21 school?

22 What types of things did you like, other
23 than going to school?

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1 A I ran track. I ran cross country. I
2 was very -- pretty active in the things kids do.

3 We had big track teams.

4 Q Did you work part time also?

5 A I worked pretty full time in college. I
6 did not work part time in high school.

7 Q And then when you went to George
8 Washington, did you work there, also?

9 A No, sir. I worked in the summers at my
10 dad's plumbing shop.

11 Q Your dad had his own plumbing company?

12 A Yes, sir.

13 Q How about your mom?

14 A She was a housewife.

15 Q Brothers and sisters?

16 A Four. I was the fourth of five.

17 Q You were fourth of five. That was -- I
18 guess I didn't ask that very well.

19 How many brothers, and how many sisters?

20 A Two sisters, two brothers.

21 Q And then you got a Bachelor of Arts in
22 history in 1974?

23 A Yes, sir.

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1 Q And that -- you were still thinking of
2 teaching at that time?

3 A Yes, sir. I am certified to teach in
4 the state of Minnesota.

5 Q Okay.

6 A Paul Wellstone was one of my politics
7 teachers. He is a Senator from Minnesota right
8 now.

9 Q Wow.

10 A He is just like he is now on TV, sir.

11 Q Yes. You have an interesting governor,
12 too.

13 A I don't know him, sir.

14 Q Dr. Sherry, what happened? In 1974,
15 what did you then do, following '74?

16 A Well, I did not do well at teaching. I
17 student taught.

18 I was -- I figured out I wasn't going to
19 be a good school teacher. I came home.

20 I took organic chemistry at the
21 University of Pittsburgh at night.

22 Q Yes, sir.

23 A I labored for Local 347 for two years.

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1 That's the plumber laborers local out of
2 Pittsburgh.

3 Q Okay.

4 A And then I went to medical school in
5 '76.

6 I worked for my dad's shop, and then I
7 went down to the union hall when he didn't have any

8 work.

9 Q And then -- I am trying to catch up.

10 Okay. You started medical school then in --

11 A '76 to '80.

12 Q And you went to medical school where?

13 A The University of Pittsburgh.

14 Q Okay. I'm sorry. I see that. I didn't
15 -- I couldn't catch up with that.

16 You graduated from the University of
17 Pittsburgh with a Doctor of Medicine in 1980?

18 A Yes, sir.

19 Q Okay. And then what did you do,
20 Dr. Sherry?

21 A I went to Mercy Hospital for a medical
22 residency for three years, and then in '83, I went
23 to Vanderbilt University for medical oncology for

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1 two years, and then in '86, '85, I returned and did
2 a year of hematology at the University of
3 Pittsburgh - Montefiore, and then in '86, I moved
4 out to Sewickley, and I have been practicing at
5 Sewickley Valley Hospital, 1986 to 2001.

6 Q And let's see. You did a fellowship
7 from '83 to eighty -- well, let me back up.

8 '80 to '83, you were -- you did a
9 medicine -- internal medicine specialty, I take it?

10 A Correct.

11 Q And then you went on to oncology at
12 Vanderbilt?

13 A Yes, sir.

14 Q And then you went on to hematology at --
15 I am going to mess up the --

16 A Montefiore.
17 Q -- Montefiore Hospital --
18 A Yes, sir.
19 Q -- of Pittsburgh. Are you -- that is
20 the same group that Dr. Bradley is involved with in
21 a broad sense, or do I have that wrong, the
22 University of Pittsburgh?
23 A No, sir.

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1 Q It is not?
2 A No, sir.
3 Q I do have it wrong. I'm sorry. They
4 are different units entirely?

5 A I think Bradley is somewhere in the
6 south, sir.

7 Q I'm sorry. I'm sorry. I am thinking
8 of --

9 MR. McLAUGHLIN: He is in Birmingham.
10 MR. SMITH: There would have been a lot
11 of them.

12 MR. McLAUGHLIN: He is in --

13 MR. SMITH: Pardon?

14 MR. McLAUGHLIN: He is in Birmingham,
15 Alabama.

16 MR. SMITH: Yes, sir. I'm sorry. I
17 was thinking of the one we did with Mary
18 Ellen last week, and that was Dr. -- I
19 pronounce his name poorly, too.

20 UNIDENTIFIED SPEAKER: Fuhrman.

21 MR. SMITH: Fuhrman, yes.

22 BY MR. SMITH:

23 Q Does that sound right, Dr. Fuhrman, the

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1 radiologist?

2 A Okay. What are you asking me about Dr.

3 Fuhrman, sir?

4 Q Is he in the same group, or is that

5 connected with --

6 A No, sir.

7 Q That is a different group entirely?

8 A He is at the University of Pittsburgh.

9 I am in private practice at Sewickley Hospital,

10 sir.

11 Q Okay. I apologize. I follow you. You

12 went to school -- you had a fellowship at the

13 University of Pittsburgh, but you didn't stay

14 there?

15 You went into private practice in

16 Sewickley?

17 A Correct.

18 Q Okay. Thanks a lot. And you have had

19 continuing medical education?

20 A Yes, sir.

21 Q You worked for Pennsylvania Medical

22 Society membership. Can you tell me about that a

23 little bit, '97 to '99?

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1 A They have a requirement you have to have

2 so many hours of education. I believe it's over --

3 I can't tell you how many, but there's

4 requirements, and to be on the staff at Sewickley

5 Hospital, you have to keep up your continuing

6 medical education certificate, and the county

7 societies and the state societies set the
8 requirements.

9 Q Okay. What type of cancer do you deal
10 with mostly --

11 A The three commonest --

12 Q -- if there is one that predominates?

13 A The three commonest cancers at Sewickley
14 Valley Hospital would be colon cancer, lung cancer,
15 and breast cancer.

16 That would be the three most common,
17 although we have a fairly representative practice,
18 you know, a number of other ones less common.

19 Q Would colon, lung, and breast cancer be
20 three of the most common in the country?

21 A Yes, sir.

22 Q So your hospital has a fairly
23 broad-based cancer -- it is a fairly broad based

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1 cancer center?

2 A It is a community hospital --

3 Q Yes.

4 A -- and it is representative of the
5 population we serve.

6 Q So it is fairly representative, like you
7 just -- as you have just stated, of your community,
8 which is probably fairly representative of most
9 communities? Would that be right?

10 A I would bet --

11 MR. KEMNA: Objection.

12 A -- yes.

13 Q Do you also have -- do you have an

14 orthopedic department there as well, is my belief,
15 my recollection?

16 A Yes, sir. Well --

17 Q So you are a fairly full service
18 hospital?

19 A Yes, sir.

20 Q Have you been at many legal matters,
21 litigation, serving as an expert on either advice
22 or rendering reports or testifying?

23 Have you been involved before in cases?

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1 A I think I have been involved in two
2 cases in my life as a witness.

3 Both involved patients I take -- I was
4 the medical -- the attending physician.

5 Q I notice a case. I am looking at the
6 back right now. There was a case, Cochran versus
7 Penn State Disability?

8 A Yes, sir. That was, Mr. Cochran was one
9 of my patients.

10 Q Yes, sir.

11 A I gave a video deposition concerning his
12 myelodysplastic syndrome and possible benzene
13 exposure, because he was a coke oven inspector down
14 at the mill.

15 Q And his disease?

16 A Myelo -- bone marrow failure,
17 myelodysplastic syndrome, a state of bone marrow
18 failure, sir.

19 Q Yes, sir. I hear you. Okay. And the
20 other one?

21 A Many years ago -- it was in the late

22 '80s -- I had a gentleman by the name of Frederick
23 Roby. It's probably '88.

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1 He was involved in asbestos litigation.

2 Q And you testified?

3 A That he had asbestos exposure and died
4 of malignant mesothelioma.

5 Q Do you see many mesotheliomas?

6 A We see -- you know, we are across the
7 river from Neville Island. That is where the
8 landing boats for the Second War were built.

9 Q Yes, sir.

10 A There's a lot of asbestos on those
11 boats, and we see probably a disproportionate
12 amount of malignant mesothelioma, or we see a fair
13 amount of it, due to the -- you know, the Neville
14 Island exposure of the landing boats.

15 Q Yes, sir. When was the first time you
16 were ever contacted about having any involvement
17 with tobacco litigation?

18 A John Brillman called me to meet with
19 Bernie O'Neill in about 1989 about -- to review a
20 case for Mr. O'Neill, who is in the room.

21 Q I have to tell you -- I should know this
22 name I am sure, because of -- but I have heard a
23 lot of names of people I didn't know before, and

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1 John Brillman I can't get a handle on.

2 A He is a physician, and he is a
3 neurologist.

4 Q Okay.

5 A He wanted me to do -- do you want the
6 details?

7 Q Sure, if you don't mind.

8 A Mr. Grigsby is an -- was an attorney in
9 town.

10 He asked Joan to find somebody who John
11 felt would be reasonable. John Brillman is a
12 neurologist down at Allegheny.

13 Q Okay.

14 A So he could not get his first choice to
15 look at the chart, and he called me up and asked me
16 to do a favor for him, so I met with Mr. Grigsby,
17 Mr. O'Neill, and a few other attorneys sometime in
18 '89 or '88 to review a case.

19 I probably reviewed four or five cases
20 for Mr. O'Neill over 12 years.

21 I have never testified for any of them
22 except this one.

23 Q And your --

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1 A This is the first deposition I have ever
2 given for the tobacco company.

3 Q Do you smoke, or have you smoked?

4 A I used to smoke when I was a school
5 teacher and in college.

6 Q You smoked from, say, about when to
7 when?

8 A I used to smoke in bars.

9 Q Do you know from about what age?

10 A It was very sporadic in my college
11 years. I never smoked outside of a bar.

12 Q It would be a social thing to do in a

13 bar, if you were there?

14 A Yes. Yes, sir. I think that's fair.

15 Q Has your wife smoked?

16 A No, sir. She used to smoke in nursing
17 school, she told me.

18 Q Pardon? She smoked in nursing school?

19 A She smoked in nursing school. I think
20 everybody in nursing school smokes, from what I can
21 gather.

22 Q How about your children? Do any of them
23 smoke?

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1 A No, sir. Well, not that I know of, sir.

2 Sometimes children do things you are not aware of.

3 Q Did your dad smoke?

4 A Lucky Strikes, sir.

5 Q About how many? How long did he smoke?

6 A He smoked until he had his myocardial
7 infarction in 1966, June. He smoked two packs per
8 day, I think, up until '66.

9 Q And about how many years did he smoke,
10 as you understand it?

11 A You know, I can't tell you that, but I
12 suspect he smoked from the '30s to '67.

13 He quit when he had his heart attack in
14 '67, the spring.

15 Q He is -- did things go okay for him
16 after that?

17 A He died in '88 of coronary disease.

18 Q Did your mom smoke at all?

19 A I -- I don't think. No, I don't think

20 ever. Never.

21 Q How about your brothers and sisters?

22 A My brother, Timmy, smoked when he was in
23 Vietnam.

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1 Q Is he the only one that you are aware
2 of, maybe other than just trying it?

3 A He quit. My brother quit in the '70s,
4 and nobody I know else -- my siblings don't smoke.

5 Q The four or five other cases you have
6 been involved in, the involvement you had was to do
7 what?

8 MR. KEMNA: I am going to object to the
9 extent that you are making an inquiry into
10 matters that Dr. Sherry would have been in the
11 role of a confidential consultant in
12 litigation that is subject to privilege, and
13 so any details that you inquire into are
14 objectionable on that basis, and I will
15 instruct Dr. Sherry not to answer the question
16 to the extent that you are making inquiries
17 into the details of those matters.

18 MR. McLAUGHLIN: I join in the
19 objection.

20 MR. SMITH: You are saying that you
21 think that has a work product basis?

22 Is that the basis of your objection?

23 MR. KEMNA: The basis is privilege, and

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1 yes, the source is work product.

2 MR. SMITH: I mean, I can't -- I am not
3 catching up with the privilege issue at all,

4 and maybe I should, but I have to tell you, I
5 am not.

6 MR. KEMNA: Well, my standing
7 instruction to Dr. Sherry is not to answer
8 questions regarding the detail of matters that
9 he would have been involved in the role as a
10 consulting expert and not otherwise disclosed
11 as an expert witness or otherwise having
12 testified in the matters in which -- to which
13 you are inquiring.

14 THE WITNESS: So do I answer or not?

15 MR. McLAUGHLIN: Right.

16 MR. KEMNA: You don't answer, Dr.
17 Sherry?

18 THE WITNESS: Oh, I'm sorry.

19 MR. KEMNA: Russ --

20 MR. SMITH: No. I hear you.

21 MR. KEMNA: -- can we --

22 MR. SMITH: I don't -- I am not sure I
23 agree with you at all, and I am just waiting.

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1 I am just thinking a minute.

2 MR. KEMNA: Well, let me give you a
3 chance to think, and let's take a brief break,
4 if you don't mind?

5 MR. SMITH: Sure. No. It's a good
6 time. I can always use a little longer to
7 think, unfortunately.

8 (Discussion off the record.)

9 MR. SMITH: Is our trustworthy person
10 who manages the clocks there?

11 MR. KEMNA: Yes. Mr. O'Neill can handle
12 this effectively.

13 MR. SMITH: Yes. That might be -- what
14 time did we start?

15 MR. O'NEILL: We started at 4:12. Now
16 it is 5:32.

17 MR. SMITH: How much time did we take
18 marking those documents?

19 MR. McLAUGHLIN: Well, Russ, you took a
20 long time.

21 MR. SMITH: I did?

22 MR. McLAUGHLIN: Yes.

23 MR. SMITH: Okay. I will be back in
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1 five.

2 MR. SHIVELY: Say, who all is here from
3 the defense? This is Ben Shively. I am just
4 curious.

5 MR. KEMNA: Don Kemna from Shook, Hardy
6 & Bacon. Bernie O'Neill from Shook, Hardy &
7 Bacon.

8 MR. McLAUGHLIN: Patrick McLaughlin.

9 MS. HAMMERHAND: And Colleen Hammerhand
10 for Liggett.

11 MR. SHIVELY: Okay.

12 MR. McLAUGHLIN: Oh, okay. Well,
13 Liggett had not identified themselves. When
14 did you get on, Colleen?

15 MS. HAMMERHAND: We were on first.

16 MR. McLAUGHLIN: Pardon me?

17 MS. HAMMERHAND: We were on first.

18 MR. McLAUGHLIN: Oh, you were?

19 MS. HAMMERHAND: Yes. I thought that
20 was picked up there. My apologies.

21 MR. McLAUGHLIN: No, I don't think it
22 was.

23 Was it?

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1 MR. KEMNA: No. That's the first time
2 we heard that particular voice.

3 MR. McLAUGHLIN: Yes.

4 MR. KEMNA: Okay. We are off.

5 (Recess taken.)

6 MR. SMITH: I am going to ask you to
7 reconsider your position on what you did, even
8 if it is as a private consultant.

9 I mean, I may be wrong, but I am going
10 to suggest to you that we would submit that
11 being a private consultant in a case might or
12 might not be shielded in that particular case,
13 but we are now after the fact.

14 Those cases are over, and here we are.

15 I don't know why it would be shielded at this
16 time.

17 MR. KEMNA: Well --

18 MR. SMITH: It is not being -- it is not
19 being invaded either for violation of a work
20 product exclusion or purposes of the case in
21 which it occurred, either.

22 It is not like someone sitting on the
23 sidelines, and somebody else does all the work

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1 in the case.

2 I mean, I don't -- but at any rate, it
3 is our -- we would submit that we think it is
4 appropriate, and you guys will do as you wish.

5 MR. KEMNA: Well, let me just say, you
6 are entitled to your opinion, Russ --

7 MR. SMITH: Absolutely. I --

8 MR. KEMNA: -- and we will maintain our
9 position on the objection and the instruction
10 not to answer within the scope as it was
11 described in the objection.

12 Whether or not you can successfully
13 challenge that point I think we should just
14 leave to a later point, where if you choose,
15 you can address it with the Judge.

16 BY MR. SMITH:

17 Q Okay. I guess, just to make sure that
18 we are square on it, Dr. Sherry, you are indicating
19 to me that at about 1989, you were asked to review
20 a particular file in a pending case? Is that
21 correct?

22 A Correct.

23 Q And can you tell us what that case was

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1 about?

2 MR. KEMNA: Objection on the same basis
3 as previously stated. To the extent that Dr.
4 Sherry has been a confidential consultant in
5 litigation in matters where he was not
6 otherwise disclosed as an expert witness --

7 MR. SMITH: If he --

8 MR. KEMNA: -- or testified at
9 deposition or at trial, we will instruct Dr.

10 Sherry not to answer the question with respect
11 to inquiries into those matters in any way
12 designed to get specific information about
13 those matters.

14 BY MR. SMITH:

15 Q Dr. Sherry, when you were involved with
16 that case, you were asked to look at a particular
17 case? Is that true?

18 A Yes.

19 Q Is that what you recall? Is that right,
20 sir?

21 A The initial case was a patient in the
22 suburbs of Pittsburgh.

23 Q And did you render a report in that
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1 case?

2 A I never -- I met with Mr. O'Neill
3 verbally.

4 I never -- I have never rendered a
5 report, written, except the one you see.

6 Q And you were not listed as a witness, to
7 the best of your understanding?

8 A I am certain I was not.

9 Q And the conversations you had regarding
10 that case were what?

11 MR. SMITH: Objection. The same
12 objection as before, Russ.

13 I don't know that I can make it any more
14 clear.

15 MR. SMITH: You are instructing him not
16 to answer?

17 MR. KEMNA: He is being instructed not
18 to answer on exactly the same basis as I have
19 repeated now two or three times.

20 BY MR. SMITH:

21 Q Now, were you also consulted regarding
22 other tobacco matters in the years to follow?

23 A Probably four or five cases, to my

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1 memory.

2 Q And can you give me the approximate year
3 of each of them, as best you can recollect it? And
4 give me a range that you are comfortable with,
5 please, Dr. Sherry.

6 A Okay. I saw -- I did a case in '89 or
7 '90, and then I can think of one in '92, one in
8 '94, one in '97, so I may be under or over
9 estimating.

10 I would bet that it was no more than
11 five cases.

12 Q Your best --

13 A Generally, we would meet. I would go
14 through the records.

15 I would answer some questions about the
16 clinical aspects of the case, and as Mr. O'Neill's
17 style, I would never hear anything about it.

18 I would have to ask him about the case
19 if I ever saw him again, and then, you know, I --
20 that was it.

21 Q Would you ever express an opinion as to
22 whether or not an injury was tobacco related?

23 MR. KEMNA: Objection to the extent that
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1 you are making inquiry into the specific
2 opinions of Dr. Sherry with respect to any
3 matter that he participated in as a
4 confidential consultant, and now you know on
5 the record that he was not listed as an expert
6 witness, nor otherwise provided testimony in
7 the case.

8 I am instructing Dr. Sherry not to
9 answer.

10 MR. McLAUGHLIN: We join in the
11 objection and the instruction.

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1 As I suggested before, if you wish to
2 challenge the basis for the objection and the
3 instruction, you have an opportunity to do
4 that with the Judge at an appropriate time,
5 and he can hear all of the arguments, but we
6 will not resolve anything today by discussing
7 it.

8 MR. SMITH: I am just trying to make the
9 record clear as best I can, and I guess what I
10 was trying to find out was whether or not you
11 gentlemen, when you first approached Dr.
12 Sherry, had made a decision prior to speaking
13 to him at all that he would only be used in a
14 consulting fashion, whether or not that
15 decision was made before you ever talked to
16 him about those cases, or whether it was made
17 after you began talking with him --

18 MR. KEMNA: Russ, this is --

19 MR. SMITH: -- and I guess that is
20 something that you don't want to discuss
21 today.

22 MR. KEMNA: Well, this is your
23 deposition of Dr. Sherry, not of me or any

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1 other counsel sitting at the table.

2 If you wish to discuss the arguments
3 that may apply to the application of a
4 privilege with a work product protection,
5 there is an appropriate time to do that, and
6 now is not the time.

7 MR. SMITH: I would ask the court
8 reporter to order the witness to answer the
9 past questions that have been asked of him,
10 and that have been -- to which he has been
11 instructed not to answer.

12 (Discussion off the record.)

13 MR. SMITH: Do you waive any of those
14 requirements?

15 THE REPORTER: We don't have the power

16 in Pennsylvania to do that.

17 MR. KEMNA: Russ, did you understand
18 what the court reporter just said?

19 MR. SMITH: No, sir, I didn't.

20 MR. KEMNA: She said that in
21 Pennsylvania, she does not have the power to
22 give such an instruction.

23 (Discussion off the record.)

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1 MR. SMITH: Let me ask this question:
2 Are you folks willing to waive any such
3 requirement, if there should be one?

4 MR. KEMNA: Russ, we are not going to
5 waive any requirement that may be applicable
6 directly to the court reporter and whatever
7 scope of power they are given by state law.

8 That is not something we are going
9 to intervene in, and that is not something
10 that I am going to say for the record here
11 today that the defense counsel is going to
12 take any particular position with it.

13 We have made our instruction to the
14 witness.

15 We have made absolutely clear the basis
16 for our objection and the accompanying
17 instruction.

18 We are standing on that, and there
19 couldn't be anything more clear on the record
20 today.

21 MR. SMITH: Are you making that
22 instruction to the witness as the attorney for

23 the witness?

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1 MR. KEMNA: The instruction is made as
2 an attorney representing my client in this
3 matter and representing my client in general
4 with respect to the litigation involved.

5 MR. SMITH: Would that entitle you to
6 instruct the witness not to answer?

7 MR. KEMNA: I have already given you the
8 indication of what I am taking a position on
9 in terms of work product, and yes, the ability
10 to instruct the witness under the
11 circumstances of the work product protection.

12 MR. McLAUGHLIN: And Russ, this is
13 Patrick McLaughlin. We have an obligation to
14 so instruct the witness, because if not so
15 instructed, and the witness answers, then the
16 privilege may be waived and certainly invaded
17 both as to attorney/client and work product,
18 so we have an obligation to object and to
19 instruct the witness not to answer the
20 question.

21 MR. SMITH: And I am taking it, I am
22 assuming that all of the attorneys involved in
23 this are taking the position that should the

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1 -- should Judge Dowd determine that it is
2 necessary for the witness to be ordered to
3 answer the question before the issue is right
4 for the court, that none of you are willing to
5 waive that requirement?

6 MS. HAMMERHAND: That's right.

7 MR. SHIVELY: That's correct.

8 (Discussion off the record.)

9 MR. SMITH: And I assume now --

10 MR. McLAUGHLIN: Russ, do you have
11 a question for the witness?

12 MR. SMITH: No. I wanted to know what
13 you guys' position is on whether or not you
14 waive that requirement.

15 MR. McLAUGHLIN: Well, we are not
16 waiving anything. Why should we waive?

17 MR. SMITH: I didn't say you should do
18 anything or shouldn't.

19 I just asked if you were.

20 MR. McLAUGHLIN: Why would we have
21 standing to waive Pennsylvania law and
22 procedure on the issue, and the court reporter
23 isn't going to respond to us in defiance of

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1 Pennsylvania law.

2 MR. SMITH: That wasn't my question, but
3 my question has been answered.

4 That's all I wanted to find out.

5 MR. McLAUGHLIN: I mean, if you want the
6 record to reflect what the doctor is going to
7 do, Doctor, do you --

8 MR. SMITH: No. I am not asking that,
9 Pat.

10 MR. McLAUGHLIN: Because I --

11 MR. SMITH: I want the -- I just asked
12 the question of the counsel.

13 MR. McLAUGHLIN: All right.

14 MR. SMITH: The next question will be to
15 the witness.

16 MR. McLAUGHLIN: All right.

17 BY MR. SMITH:

18 Q Dr. Sherry, you were paid money for
19 these consultations, I am assuming?

20 A That's a correct assumption.

21 Q And somewhere you made a decision to
22 write a book.

23 Can you talk with me about that, what

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1 kind -- what led you into wanting to do that?

2 A Jack McKeating, my brother-in-law, had
3 Hodgkins in 1989, so I went out to Borders, and I
4 went out to the book stores in Ross Park Mall, and
5 I went looking for stuff to give to my brothers and
6 sisters, you know, the McKeatings.

7 There's probably 30 of them. There's
8 eight kids. They have got a million grandkids.

9 So Jack got diagnosed with Hodgkins. I
10 went out to the book store, and I thought it was
11 pretty bad material that, you know, guys like me,
12 working, taking care of patients wouldn't write a
13 book, so I thought there was a need for a book that
14 would explain stuff pretty simple to patients in a
15 not New Age, touchy-feely, or, you know, down the
16 middle of the road orthodox medicine, so I thought
17 there would be, like, a need for that, so I started
18 writing a book, and then it took me about a year
19 and a half to get a publisher to pick it up, and in
20 fact, I didn't get anywhere until one of those
21 writer magazine books on my desk, and it was an

22 agent from Erie, Pennsylvania. You know, there are
23 no author's agents from Erie, Pennsylvania, so I

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1 wrote this lady a letter.

2 It turned out she had cancer, and she
3 liked the idea, so then my agent became my
4 advocate, and she hustled the book, and then I got
5 a contract from Plenum, and it took me about a year
6 and a half to get a contract, and I don't -- I got
7 26 or 27 rejections, and Plenum decided they liked
8 the book, and it was because of my agent that I
9 think I got a contract, and then from the years '91
10 to '93, I wrote it, or '94, I wrote it.

11 It came out in '94, and I was kind of
12 enthused about it, and I went on an author's tour,
13 and I was on Jim Bohannon's show, so I was kind of
14 excited, and then [DELETED],
15 and I have not paid much attention to this book
16 since then, and I think it is out of print.

17 I think it was noble, something I did.

18 I didn't make any money out of it.

19 I thought it was going to help my
20 practice. It probably didn't do that, but I wanted
21 to do that.

22 Q How is [DELETED]?

23 A [DELETED]

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1 [DELETED], but I, you
2 know, after [DELETED], I quit hustling the
3 book.

4 I have gone back to practicing.

5 Well, I never got away from practicing,
6 and I would never write another book. It's too
7 much work.

8 Q I would like to get a copy of that book
9 from you, if I can.

10 MR. McLAUGHLIN: You have to buy one.

11 THE WITNESS: Those are tough.

12 MR. SMITH: Well, I think that's a whole
13 issue that we have had, but I think -- I think the
14 book may be out of print, based on what I just
15 heard.

16 A If you can't get a copy, I can get you a
17 copy, I believe.

18 Q Okay. I would appreciate it. You wrote
19 a -- I need help on what it was precisely, but it
20 is titled "Knowledge Therapy, Understanding Cancer
21 is Vital to Treatment?

22 A "How to Care for Today and Tomorrow."

23 Q Oh, I'm sorry. But you wrote something

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1 in the Pittsburgh Post Gazette following that?

2 A Well, let me look at it. I've got it.
3 I've got it. Hold on.

4 Q Yes, sir.

5 A Oh, yes. It's before [DELETED]
6 I would write articles.

7 Q Sort of a guest writer?

8 A Yes. You would get -- you know, after
9 you do something here local, you get solicited.

10 Q Sure. And you did one for them on focus
11 of lung cancer, also?

12 A No. That was that support, national

13 support magazine.

14 Q Okay.

15 A That was about lung cancer. As long as
16 you don't tell anybody, I lifted paragraphs out of
17 my book.

18 Q Okay.

19 A You know, I don't want to get into
20 plagiarism problems.

21 Q But you put -- was the book called --
22 the publication, that was called "Coping, Living
23 With Cancer"?

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1 Am I catching up with you?

2 A Yes. That's a magazine that is
3 published for cancer survivors.

4 Q Okay. And this was an article you wrote
5 for them?

6 A Yes. I don't have a copy of it. I
7 believe -- I am almost certain that everything in
8 that article is in the book --

9 Q Okay.

10 A -- or close to it.

11 Q You had written three earlier pieces
12 regarding breast cancer as well? Is that correct?

13 A Yes, sir. They were more -- they were
14 scientific articles.

15 Q Okay. You -- and I guess before we
16 started off in that direction, we were on page
17 three, paragraph three of your opinions?

18 A Yes, we were.

19 Q And I think we were -- I am not sure

20 that this is precisely true, but I think it is. We
21 were in that first sentence of number three, and
22 you had indicated that Dave Tompkin had two
23 significant risk factors, or at least the most

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1 important of his risk factors were asbestos
2 exposure and his family history of cancer? Is that
3 correct?

4 A Yes, sir.

5 Q Could you flesh out the reason you say
6 the asbestos exposure?

7 A Well --

8 Q You mentioned that you see --

9 A Well, in the paragraph I wrote "other
10 risk factors," right.

11 Q Yes, sir, and then these were the two.

12 A And then the most important would be
13 asbestos and history of family.

14 Q Yes, sir.

15 A Yes, sir.

16 Q And if you could flesh out the exposure
17 to asbestos part of that, please?

18 MR. KEMNA: Objection. Form.

19 THE WITNESS: What do I do? Answer?

20 MR. McLAUGHLIN: Answer.

21 MR. KEMNA: If you understand the
22 question.

23 A My understanding is, asbestos is an

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1 associated and accepted risk factor for lung
2 cancer.

3 Q And you base that upon what?

4 A Well, that was where we got off the
5 topic.

6 Q Yes, sir. That may well be. We got off
7 on this sentence, I know.

8 A Yes. I think from reading in the
9 medical texts and my clinical experience and --

10 Q And it is --

11 A -- and some of the research --

12 Q -- including --

13 A -- including the research I did for the
14 book.

15 Q Can you tell me about that, the research
16 that you did?

17 Is there anything about it that you can
18 think of specifically, either that, or your general
19 reading in medicine?

20 MR. KEMNA: Objection.

21 A Well, I just would go and read
22 definitive texts.

23 Q And you remember reading that asbestos

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1 was a risk factor for lung cancer?

2 A I believe I do.

3 Q And you mentioned the family history of
4 cancer. Can you tell us about that feature's role,
5 please?

6 MR. KEMNA: Objection.

7 A You know, in all standard history, they
8 take a standard history of family history.

9 Q Yes, sir.

10 A It is generally considered to be

11 standard in all history and physicals, and in lung
12 cancer, it is a risk factor in -- I think in the
13 medical literature.

14 It is not -- I don't think it is the --
15 the strength of the risk factor is asbestos, but it
16 is a -- there's literature out there that say that
17 the family history is an independent risk factor.

18 Q Are there any other risk factors that
19 come to mind in that first sentence?

20 Are those the two, or are there any
21 others that come to mind?

22 MR. KEMNA: Objection. Form.

23 A I mean, I could pull my book out.

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1 There's a whole paragraph of stuff. I would not --

2 Q No. I mean risk factors regarding Dave
3 Tompkin specifically, any.

4 A Well, I mean, there is a debate on
5 whether alcohol abuse is a risk factor. Some --

6 Q Where do you come down on that?

7 A It is a higher risk factor for head and
8 neck cancer.

9 Q Okay. But as far as lung cancer goes?

10 A I think it is controversial.

11 Q Do you have an opinion one way or the
12 other?

13 A I think if it -- in that if it is a
14 marker for poor nutrition, then it is a risk
15 factor, people with bad nutrition and debility,
16 like many people that drink, but I don't think it
17 is a -- it is a controversial risk factor, in my
18 opinion. It may be --

19 Q If I --

20 A -- depending on the context.

21 Q If I am hearing you right, and I want
22 you to correct me if I am wrong, but I want to try
23 to say it simplistically, as saying that in your

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1 view, that if someone's drinking caused them to get
2 poor nutrition, and then they became debilitated,
3 that from that sense, it would be a risk factor for
4 lung cancer?

5 A Yes.

6 MR. McLAUGHLIN: Objection to farm.

7 BY MR. SMITH:

8 Q Does that sound right?

9 A And then there is other literature. I
10 mean, some folks have written it, and it is a
11 minority view in the literature, I believe, but
12 there are some articles that think -- I don't think
13 I can say with certainty that alcohol is a big risk
14 factor for lung cancer.

15 Q Okay. You mentioned the elevated level

16 of asbestos fibers in Dave Tompkin's lungs? Is

17 that correct?

18 A Yes, sir.

19 Q And do you consider that to be very
20 significant?

21 A Well, I think it is operative in this
22 case.

23 Q Because it shows he had asbestos in his

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1 system?

2 A I think it showed he had an asbestos
3 exposure, occupationally and pathologically.

4 Q And then in the last sentence, tell me
5 what you are saying there, if you would.

6 MR. KEMNA: Objection. Objection to
7 form.

8 A Do you want me to --

9 Q I can read it, but can you put that
10 in --

11 A Well --

12 Q -- lay terms? Can you lay out what you
13 are saying there --

14 MR. KEMNA: Objection to form.

15 Q -- or can you not?

16 MR. KEMNA: The same objection.

17 A You know, I think it is pretty straight
18 forward.

19 It's hard to be certain when there are
20 other known accepted factors for lung cancer.

21 Q And that's from your perspective?

22 A Well, I think it's from -- I think it's
23 a common sense perspective. I --

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1 Q Let me ask this. There's ones we have
2 spoken of. The asbestos is a risk factor, in your
3 view?

4 A Yes.

5 Q Right, sir?

6 A Yes, sir.

7 Q And Dr. Sherry, the family history is a
8 risk factor, in your view?

9 A Yes, sir.

10 Q And I believe, and I want you to correct
11 me if I am wrong -- or I am going to withdraw that.

12 Do you think that his smoking was a risk
13 factor?

14 A Yes, sir.

15 Q Would it be your opinion that those
16 three items would be, in your opinion, the three
17 strongest risk factors for his lung cancer? And by
18 "those three," I mean the asbestos, the family
19 history, and the smoking.

20 A I think they are accepted risk factors

21 --

22 Q But in your --

23 A -- in patients.

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1 Q -- judgement, if we were going to carve
2 out what you thought were the three most likely
3 candidates, would those be the three?

4 MR. KEMNA: Objection to form.

5 A Well, I think they are three that -- you
6 know, there may be other ones that, you know,
7 nobody knows about.

8 Q Yes, sir. But of the ones that you are
9 aware of, and, you know, change the -- put anything
10 else in there, if you would rather, but I just want
11 to know -- I want to know where you are coming
12 from, but of the ones that you are aware of, would
13 those be the three strongest candidates?

14 A I would --

15 MR. KEMNA: Objection to form.

16 A I think that they would be the three

17 most obvious.

18 I don't know if strongest, but they are
19 the most obvious.

20 Q Is there any other that you think of,
21 that you can think of that would be stronger than
22 one of those three, or more likely?

23 A Well, I mean, there are other exposures

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1 that weren't in the case, so I don't think so.

2 Q Okay.

3 A You know, uranium; if he had a uranium
4 exposure that we don't know about.

5 Q Sure. But you are not aware of him
6 being in a uranium situation is my belief?

7 A Yes, I believe that.

8 Q Okay. Let me ask you this question from
9 you: Is it possible, in your mind, that all three,
10 or any combination thereof, were causes of his lung
11 cancer?

12 MR. KEMNA: Objection.

13 MR. McLAUGHLIN: Objection.

14 A I think there are three risk factors.

15 Q And based on -- and when you say "risk
16 factor," you mean what, Dr. Sherry?

17 A Well, you have got to draw a distinction
18 between risk and cause --

19 Q Yes, sir. Go ahead. I will --

20 A -- and causality is -- if it was were a
21 cause, everybody who smoked would have lung cancer.

22 Q If that were a cause --

23 A It mean, if there is cause and effect,

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1 so you can't talk about, really, cause, because
2 everybody who smokes doesn't get lung cancer, so
3 you have to talk about probability and risk --

4 Q Okay.

5 A -- and that implies to me associations,
6 rather than causes.

7 Q Let me see if -- okay. I understand
8 how you are using the term "cause," but the -- we
9 know that he had -- or withdraw that.

10 Is it your opinion that he did have
11 adenocarcinoma, based upon what you read?

12 A Well, that is another explanation, you
13 know.

14 Five percent of all adenocarcinomatous
15 lungs have no exposures --

16 Q Yes, sir.

17 A -- so that would be the fourth
18 explanation of reality, you know, when you are
19 saying other things that could be germane.

20 Q Okay.

21 A You know, I mean, I know that's -- but
22 that happens.

23 The literature says it happens in five
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1 to ten percent, so I just -- that just came to my
2 mind when we were talking, sir.

3 Q Fair enough. But is it your opinion
4 that he had adenocarcinoma?

5 A Yes.

6 Q And if I am hearing you, you are saying
7 that there comes to mind, to your mind at this

8 moment in time, four risk factors?

9 A Well, four possible associations.

10 Q And when you are using the word
11 "association," you are meaning that to say what?

12 MR. KEMNA: Objection to form.

13 A Four possible reasons or events that
14 occur in patients, I mean --

15 Q Okay.

16 A -- to draw the distinction between risk
17 and cause, because that's -- you know, that's, I
18 think, key here.

19 Q And those would be the four risks that
20 come to your mind regarding Dave Tompkin, as I hear
21 you?

22 A Yes.

23 Q Is that fair?

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1 A Yes.

2 Q And as to -- and as far as going beyond
3 that, are you able to?

4 A I mean --

5 MR. KEMNA: Objection to form.

6 MR. McLAUGHLIN: Objection.

7 A I mean, I don't know. You know, I mean,
8 if you want to ask me more -- I don't know what
9 you are saying.

10 MR. McLAUGHLIN: I don't think that's a
11 proper question.

12 BY MR. SMITH:

13 Q I guess my question would be that, are
14 you saying to me that in your view, those four
15 items that you have just listed, asbestos, family

16 history, smoking, or these other five percent other
17 factors were all, in your judgment, risk factors
18 that may have been reasons for Dave Tompkin's lung
19 cancer?

20 MR. KEMNA: Objection.

21 BY MR. SMITH:

22 Q Is that an honest statement?

23 A I think I would say they were -- they

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1 exist in his case.

2 Q Okay. Did I say it accurately, though?

3 Did I say what you were telling me accurately?

4 MR. KEMNA: Objection to form.

5 MR. McLAUGHLIN: No. That is not what

6 the doctor testified to.

7 BY MR. SMITH:

8 Q Correct me if I am wrong. I really
9 would like you to.

10 I do want to understand what you are
11 saying when we are done, though.

12 MR. McLAUGHLIN: Objection. Ask a
13 proper question.

14 He is not here to correct you, Russ.

15 MR. SMITH: That is my question, Pat.

16 He is not here to ask the questions, either.

17 I am just asking -- that is a fair
18 question, and I would like the court reporter
19 to read it back.

20 MR. McLAUGHLIN: I am not asking a
21 question. I am making a objection.

22 MR. SMITH: This is not your deposition,

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1 MR. McLAUGHLIN: I am making an
2 objection.

3 MR. SMITH: I heard it.

4 (Discussion off the record.)

5 (Record read.)

6 MR. McLAUGHLIN: You may have to go
7 back.

8 BY MR. SMITH:

9 Q That's all I want to know, and I don't
10 care. You can correct it any way you want, really,
11 but I --

12 MR. KEMNA: Well --

13 MR. McLAUGHLIN: Let's read again what
14 you said.

15 MR. SMITH: Let's let the witness ask,
16 Pat.

17 MR. KEMNA: Russ, I think the
18 problem --

19 MR. SMITH: That's my question to the
20 witness. The witness can answer that.

21 He doesn't have to have you folks
22 instructing me.

23 MR. KEMNA: Well, the problem is that

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1 the question that was just read by the court
2 reporter is vague unless you know what it was
3 relating back to.

4 BY MR. SMITH:

5 Q Look, answer their question.

6 MR. SMITH: Pat, ask him a question.

7 MR. McLAUGHLIN: I don't have a question
8 to put to the witness.

9 MR. KEMNA: Pat never asked a question.
10 I haven't asked a question.

11 We are asking you to clarify your
12 question to the witness

13 BY MR. SMITH:

14 Q Do you understand my question, Dr.
15 Sherry? Just tell me if you do, or you don't.

16 A I thought you asked me what risk factors
17 or explanations, I mean, if I can use the word
18 "explanations" --

19 Q That's fine. That's just --

20 A -- possible explanations or operative
21 circumstances --

22 Q Yes, sir.

23 A -- kind of facts of his case --

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1 Q Pardon?

2 A -- why Mr. Tompkin would get lung
3 cancer --

4 Q Yes, sir.

5 A -- and they would include family
6 history, and not in any order --

7 Q Yes, sir. I understand.

8 A -- smoking exposure, asbestos exposure,
9 family history exposure, with the proviso that five
10 to ten percent of all lung cancers have no -- have
11 no -- neither -- no well-recognized exposure or
12 risk factors, which would be the fourth, which
13 really isn't a risk factor.

14 You know, the fourth one isn't a risk
15 factor. It is a statement of reality or of
16 scientific fact.

17 Q Fair enough. Let's go to item four of
18 your opinions, please.

19 I take it you talked earlier about the
20 fact that a person -- you know, you referred to the
21 fact that adenocarcinoma could occur in non-smokers
22 as well as smokers? Is that correct?

23 A I believe so.

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1 Q And do you recall any specific medical
2 literature that you are thinking of when you make
3 that statement?

4 A It is a statement in my book. It is
5 pretty well -- I think it is pretty well accepted.

6 I remember hearing it as early as the
7 early '80s.

8 Q And we have talked about -- we talked
9 about that issue earlier, I believe --

10 A Yes, sir.

11 Q -- that adenocarcinoma with non-smokers
12 could include -- or withdraw that.

13 I think I had asked you the question in
14 general about your cancer patients. You have
15 already covered that, so I will withdraw my
16 question.

17 In the second sentence, you indicate, as
18 I read it, that Dr. -- I mean, that Dave Tompkin's
19 lung tumor was not typical of the adenocarcinomas
20 that you had treated.

21 Can you tell me why you say that,

22 please?

23 A Because he lived three years and --

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1 Q After diagnosis?

2 A Yes, I mean, and it is just a clinical
3 point. It was an unusual clinical behavior.

4 Q Let me ask this question, though, just
5 so that I do follow you.

6 You are not saying that has any bearing
7 on whether or not his smoking involved his lung
8 cancer?

9 You are just making that observation as
10 a distinction between adenocarcinomas that you have
11 treated? Is that true, or is that --

12 A Well, it --

13 MR. KEMNA: Objection. Form.

14 A Well, I think the sentence says it was
15 not typical of the adenocarcinomas of the lungs I
16 have treated.

17 Q Yes, sir. But is there any relevance to
18 this case in your saying that, that you can think
19 of?

20 MR. KEMNA: Objection.

21 A I think Mr. Tompkin's survival was
22 unusual.

23 Generally, lung cancers are much more

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1 aggressive than his, and it was a little bit -- it
2 was just a clinical observation.

3 Q But you can't -- I mean, I guess what I
4 am trying to understand, if there is something

5 behind the woodwork that I am not seeing here, sir.

6 That has no bearing on this case as far
7 as what is before the Court, as far as what you
8 know, does it, or doesn't it?

9 MR. KEMNA: Objection.

10 A Well, I mean, in the sense that it was
11 an unusual clinical course that was not typical of
12 the lung cancers I have treated in the past.

13 Q Have you talked about that issue with
14 anybody else in this case, it not being typical?

15 A Like who, sir?

16 Q Any of the attorneys or any --

17 A Well, that point, I met with Mr.
18 O'Neill about three years ago, and he took it in
19 his notes, and when he called me a couple months
20 -- I guess he called me six weeks ago --

21 Q Yes, sir.

22 A -- and we went over all the things I
23 told him three years ago, and that was one of the

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1 points I made three years ago, and I remember
2 making it after we went over everything, but the
3 original observation was mine --

4 Q Does that --

5 A -- and in that perspective, I made it in
6 the context that it was unusual, and in these cases
7 that we review, they like to have a fairly complete
8 view of the typicality and atypicality of
9 malignancies based on my experience, so it was my
10 observation three years ago.

11 Mr. O'Neill reminded me.

12 Q Okay. So that's a question they asked

13 you?

14 A But the original observation, once he
15 mentioned it, I remembered mentioning it to him,
16 you know, three years later.

17 Q I understand. To your -- to the best
18 of your knowledge, does that atypicality have any
19 medical significance?

20 MR. KEMNA: Objection.

21 A Well, earlier in the record there was a
22 reference in that black little folder of adeno of
23 unknown primary --

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1 Q Okay.

2 A -- and, you know, if you had told me he
3 had an adeno of unknown primary, it would have --
4 you know, those are unusual malignancies, and in
5 that sense, I thought it was germane, and it is
6 unusual this guy, this poor patient lived three
7 years with lung cancer.

8 Q And this is adeno of unknown primary
9 that you are referring? Is that correct?

10 MR. KEMNA: Objection.

11 A Well, that's the context I remember
12 making in my original discussion three years ago
13 with Mr. O'Neill.

14 Q But those are distinguished from
15 adenocarcinomas?

16 A Of the lung.

17 Q Pardon?

18 A Yes.

19 Q And do you know whether or not those are

20 caused by smoking, or can be?

21 A They are not.

22 Q But it is your view that this is in fact
23 an adenocarcinoma? Is that correct?

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1 A Yes. It was an indolent adenocarcinoma
2 of the lung, and it was atypical, because it grew
3 so slow.

4 Q Okay. Have we covered your opinions and
5 their bases to the best of your knowledge and
6 belief?

7 MR. KEMNA: Objection.

8 A I mean, I don't have anything more to
9 say if you don't have anything more to ask.

10 Q No. The only thing I have to say is, I
11 tried to go through your report, and I wanted to
12 make sure that I didn't want to have any surprises
13 later on.

14 I just wanted to make sure, that you are
15 welcome to look back through it.

16 I just want to know if I covered -- I
17 thought we attempted to, but if we covered -- have
18 we covered your opinions and their reasons and
19 bases and facts and information upon which they are
20 based and which support them?

21 MR. KEMNA: Objection. I mean, Russ,
22 you have asked a series of questions.

23 It is up to you to explore the detail of

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1 Dr. Sherry's opinions.

2 MR. SMITH: I object to the speaking
3 objection, but that's okay. That's fine.

4 That's fine as an objection. I'm sorry.

5 BY MR. SMITH:

6 Q All right. Dr. Sherry, your answer to
7 my question would be what?

8 A Well, I think my report is pretty
9 straight forward, and I think we covered it.

10 Q Okay. That's all I wanted to know. In
11 your experience, what has been the normal length of
12 survival in adenocarcinomas after diagnosed?

13 A 18 months.

14 Q Okay.

15 A At III-B, 18 months, Stage, you know,
16 III, it's 18 months --

17 Q And?

18 A -- Stage III.

19 Q If they are diagnosed at a Stage III
20 situation?

21 A Uh-huh, yes, sir.

22 Q Are they ever diagnosed at earlier
23 stages?

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1 A Yes, sir.

2 Q So earlier stages might go longer, but
3 if they are in a Stage III --

4 A It is unusual.

5 Q -- it would be about 18 months?

6 A Yes, sir.

7 MR. SMITH: Objection.

8 MR. McLAUGHLIN: Objection.

9 BY MR. SMITH:

10 Q Are you making that statement in the

11 combination of your experience, and what you have
12 read?

13 A I think that's a fair number from the
14 literature.

15 Q Okay. Any literature that comes to mind
16 that supports that?

17 A Probably those textbooks. It's probably
18 in a lot of spots. I bet you it's in my book.

19 Q Okay.

20 A Hold on. Maybe not.

21 I say in the book, Stage III, only 15
22 percent survive longer than five years.

23 MR. McLAUGHLIN: What page?

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1 Q So that would mean --

2 THE WITNESS: Page 34.

3 BY MR. SMITH:

4 Q -- most people would die before that
5 time, then, obviously?

6 A The average survival is a year and a
7 half.

8 Q Do you ever render opinions as to the
9 cause of lung cancer in a non-legal setting?

10 MR. McLAUGHLIN: Objection.

11 A I tell people that, you know, that lungs
12 -- smoking is a risk factor for lung cancer.

13 I advise my patients to quit smoking.

14 Q Yes, sir. But most people that you
15 treat, that you would diagnose their condition as
16 lung cancer, does the diagnosis ever say, "Lung
17 cancer caused by smoking," or "Lung cancer caused
18 by" --

19 A I don't --
20 Q -- anything --
21 MR. SMITH: Objection.
22 Q -- or does it just say --
23 A I don't remember saying that. I advise
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1 them it is a risk factor.

2 Q Okay. And you diagnose what their
3 condition is --

4 A Yes, sir.

5 Q -- for those that get lung cancer? I am
6 guessing -- let me -- the first case that you
7 ever did for Shook, Hardy & Bacon, what was the
8 medical condition?

9 MR. KEMNA: Objection.

10 MR. SMITH: Was that one of -- okay.
11 That was one of -- okay. That was one of
12 those that was confidential as well?

13 That was when you had him as a
14 confidential witness? Is that correct?

15 MR. KEMNA: Well, let's just clarify,
16 Russ.

17 MR. SMITH: Yes.

18 MR. KEMNA: It is clear on the record
19 that Dr. Sherry has only been listed and is
20 now is testifying in one case where he would
21 not have been considered a confidential expert
22 in the case.

23 (Whereupon, Dr. Sherry left the room.)

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1 MR. KEMNA: All prior cases to this one,

2 he has described as those where he was not
3 listed, and let me add, Russ, that Dr. Sherry
4 has now had to leave the room to make a call
5 for a page --

6 MR. McLAUGHLIN: An emergency page.

7 MR. KEMNA: -- that he has been given.

8 MR. SMITH: Sure. We will take a short
9 break, then.

10 MR. McLAUGHLIN: Yes. He has got an
11 emergency call.

12 MR. SMITH: Okay. Unless you want to
13 make something further on the record. I am
14 not trying to shortcircuit you.

15 MR. KEMNA: No. I think that's clear.

16 MR. SMITH: Thank you. We will be back
17 in a couple of minutes, I hope?

18 MR. McLAUGHLIN: Yes. Hopefully five.

19 MR. KEMNA: All right. Five minutes.

20 (Recess taken.)

21 BY MR. SMITH:

22 Q Dr. Sherry --

23 A Yes, sir?

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1 Q -- I have one last question for you.

2 You were talking about Rosie earlier --

3 do you remember -- that announcer?

4 A Rosie Rosewell, yes.

5 Q Yes. Do you remember the old dipsy
6 doodle?

7 A I do not. You know, you are a little
8 older than me, because I think he got out of it in
9 the late '50s.

10 Q Oh, I couldn't be that old.
11 A Bob Prince became the voice in '58.
12 Q Yes, he did, but that was another one.
13 I am older than you.

14 A "Kiss it goodbye" was Bob Prince.

15 Q That's all the questions I have.

16 A Thank you.

17 Q Thank you.

18 MR. KEMNA: Thanks, Russ.

19 MR. SMITH: Signature? Does Dr. Sherry
20 want to read it?

21 MR. KEMNA: He will sign.

22 MR. SMITH: Okay. Good luck with your
23 daughter.

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1 THE WITNESS: Thank you, sir. Thanks.

2 (Discussion off the record.)

3 MR. SMITH: I do have one request on the
4 record, Mary Ellen.

5 I would like you to get the copies of
6 the exhibits marked, with the exception of the
7 ones that were constructively marked, but I
8 would like Dr. Sherry to please hold onto
9 those, because we may not be able to do it,
10 but we may be asking for parts of those, and I
11 do believe that with respect to Dr. Sherry's
12 book as well, but at any rate, if he would
13 please hang onto those, and the rest, if you
14 would, those marked exhibits, if you would
15 take them with you.

16 MR. KEMNA: Russ --

17 MR. SMITH: Yes, sir?

18 MR. KEMNA: -- just for clarification,
19 we did have two folders marked that contained
20 those x-rays.

21 Those are not something that we are
22 going to give to the court reporter.

23 We have made it clear on the record the
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1 identification of those x-rays. 126

2 MR. SMITH: Dr. Sherry can take custody
3 of those, also.

4 MR. KEMNA: Well, we actually, at Shook,
5 Hardy, will maintain custody of those copies
6 of the x-rays.

7 MR. SMITH: You guys put down the ground
8 rules -- I can see that -- and your ground
9 rules, you are willing to maintain them so
10 that we can have them as needed?

11 MR. KEMNA: Well, we have identified
12 them. We have identified them clearly on the
13 record, Russ.

14 MR. SMITH: I am not critical of you,
15 but my question is, respectfully, if we should
16 for some reason need them, you would be
17 respectfully willing to provide them?

18 MR. KEMNA: If you otherwise don't have
19 those copies in your possession, which I would
20 hope that you would have since the outset, but
21 if you don't, we will come to some arrangement
22 to make sure that you have a complete
23 collection.

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1 MR. SMITH: Okay. We will see you all.

2 MR. KEMNA: All right. See you, Russ.

3 - - -

4 (Whereupon, at 6:37 o'clock PM, the
5 deposition was concluded.)

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2 C E R T I F I C A T E

3 COMMONWEALTH OF PENNSYLVANIA)
4 COUNTY OF ALLEGHENY)
)
) SS:

5 I, Mary Ellen Wolf, a Notary Public for the
6 Commonwealth of Pennsylvania, do hereby certify:

7 That the witness named in the deposition,
 prior to being examined, was by me first duly
 sworn;

8

9 That said deposition was taken before me at
10 the time and place therein set forth and was
 taken down by me in stenotypy and thereafter
 transcribed by me via computer;

11 That said deposition is a true record of the
12 testimony given by the witness and of all
 objections made at the time of the examination.

13 I further certify that I am neither counsel
14 for nor related to any party to said action, nor
 in any way interested in the outcome thereof.

15 IN WITNESS WHEREOF, I have subscribed my name
16 and affixed my seal this _____ day of
 _____, 2001.

17 THE ABOVE CERTIFICATION DOES NOT APPLY TO
18 REPRODUCED TRANSCRIPT COPIES, UNLESS UNDER THE
 DIRECT SUPERVISION OF THIS REPORTER.

19

20 _____
21 Mary Ellen Wolf
 Notary Public in and for the
 Commonwealth of Pennsylvania
 My Commission expires March 31, 2004

22

23

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1 IN RE: TOMPKIN vs. THE AMERICAN TOBACCO COMPANIES,
 et al.

2

3 I, DR. MICHAEL SHERRY, do hereby certify
4 that the foregoing is a true and correct
 transcription of my testimony in the above-entitled
 matter.

5

6

7

8 _____
 MICHAEL SHERRY, M. D.

9

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15 Subscribed and sworn to before me on

16 this _____ day of _____, 2001.

17

18

Notary Public

19

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1 CORRECTIONS TO THE DEPOSITION OF MICHAEL SHERRY
TAKEN THURSDAY, JUNE 28, 2001

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3 PAGE LINE CORRECTION

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